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THE EARLDOM OF MAR  
IN SUNSHINE AND IN SHADE  
DURING FIVE HUNDRED YEARS.



# THE EARLDOM OF MAR

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IN SUNSHINE AND IN SHADE

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DURING FIVE HUNDRED YEARS.

WITH INCIDENTAL NOTICES  
OF THE LEADING CASES OF SCOTTISH DIGNITIES FROM THE  
REIGN OF KING CHARLES I. TILL NOW.

*IN REPLY TO AN ADDRESS TO THE PEERS OF SCOTLAND BY  
WALTER HENRY EARL OF KELLIE, MAY 1879.*

LETTERS

TO

THE LORD CLERK REGISTER OF SCOTLAND  
(GEORGE FREDERICK EARL OF GLASGOW, LORD BOYLE, ETC.)

BY THE LATE

ALEXANDER EARL OF CRAWFORD AND BALCARRES,  
LORD LINDSAY, ETC.

IN TWO VOLUMES.

VOL. II.

*‘Thrice is he armed that hath his quarrel just.’*

EDINBURGH: DAVID DOUGLAS

1882.



## ANALYSIS OF CONTENTS OF VOLUME II.

## LETTER VII.

## DECREET OF RANKING AND UNION ROLL.

PAGE

WHILE it has been mentioned cursorily in last Letter that the Ranking of Mar in 1606 proves that it was the old Earldom that was restored, the general subject of the Decreet of Ranking and Union Roll—the subject of Lord Kellie's special challenge—is reserved for this Letter. Before entering on my narrative of facts, I shall state the objections made and conclude by refuting them. I must also touch on the criticisms of Lords Chelmsford and Redesdale, with Lord Redesdale's letters to the *Times* and to myself, and Lord Kellie's observations pointing to alteration of the Roll, . . . . .

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on it, are unworthy of credit, and open to revision by House of Lords, . . . . .	PAGE 6-9
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- (1.) Charge of superficial inquiry. Lord Kellie's words as to brief period allowed. Proceeds on wrong hypothesis as to duty of Commissioners, who had only to examine the evidence adduced, inquiries of a more recondite character being reserved for Court of Session. It was not till after 1660 that any process was instituted there on allegation of erroneous ranking on documents produced in 1606. Cases of Buchan and Glencairn proceeded on absence of Peers and non-production of documents. The Decreet met with general acquiescence, . . . . . 21-23
- (2.) That the Commissioners had no means of knowing whether evidence was withheld. Quote Lord Chelmsford's words—answered by the fact that the Decreet was provisional, not final. There was no means of enforcing production of documents except by appeal to Court of Session. No court can prevent the fraudulent withholding of evidence whose existence is unknown; but it is not easily understood in England how the Scottish Peers then lived in glass houses. Evidence of this

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(3.) Decreet inaccurate, and thus not to be founded on; a charge resting on three bases, . . . . .	25
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founded, would seriously discredit the Decreet. The general objection is connected with Mar in the impeachment that a superficial inquiry of a few months is not to be put in competition with the recent exhaustive inquiry. A finality is here attributed to the Decreet which was not contemplated; it is presumed that the corrections of the Court of Session discredited it instead of being supplementary to it; and the fact is overlooked that while no one ever ventured to impugn the Mar precedency, the contention was all the other way. This objection cannot be answered without a clear view of cases of Buchan and Glencairn, cases full of instruction, and illustrating the true value of the *dicta in disprezzo* of the Decreet and Union Roll, . . . . . 32-34

a. *Buchan*.—The correction took place in 1628 as the result of an action at the instance of Countess Mary (and her husband, Earl by courtesy), daughter of Christiana, also Countess in her own right (both inheriting under a regnant of 1547 containing *no specification of the dignity*, and substituting heirs-female for heirs-male), against five Earls unduly ranked to her prejudice. She had been a minor, and unrepresented in 1606, and her ranking had therefore been too low. She got decree without opposition, . . . . . 34, 35

b. *Glencairn*.—Expression “more than once altered” calculated to create prejudice; whereas circumstances strikingly illustrate the character of the intervention of the Court to rectify the shortcomings, not of the Commissioners, but of the Peers who had been summoned, and of the deference with which that intervention was recognised, . . . . . 35

Earldom of Glencairn created before Sauchieburn (1488), with limitation “*hæredibus suis*.” That battle was succeeded by an Act Rescissory directed against acts by late King during preceding eight months, which, however, had no effect against this Earldom; and the grandson of the grantee was recognised as Earl in 1503. The charter of 1488 is, by a final decret of Court of Session of 1648, the only valid creation. The then Earl of Glencairn did not “compear” in 1606: and the charter of 1488 not being recorded, he got precedence according to the earliest evidence found, *i.e.* after Eglinton, Montrose, Cassillis, and Caithness, all created after 1488. In 1609, Glencairn, producing the charter of 1488, raised a reduction in which Eglinton and Cassillis were summoned, but Montrose and Caithness overlooked, and got decret; but this decret, being in absence, was recalled at Eglinton’s instance, in consequence of this omission, in 1617. The precedence was again rectified by a final judgment in an action in which all four Earls were summoned. As an

interlude, Glencairn in 1641 petitioned Parliament to take up his cause, who refused to interfere, and referred him to the Court of Session. The rebellious Parliament of 1649, less scrupulous, took the matter up, replacing Eglinton; but their act was in any view <i>ultra vires</i> , and their whole proceedings were rescinded at the Restoration, the decret in favour of Glencairn being restored to full validity. Once afterwards the precedencies of Glencairn and Eglinton were inverted on the roll of Parliament; but the mistake was rectified, and the ranking of 1648 was adhered to till the Union. Glencairn's ranking was never altered so as to warrant Lord Kellie's inference, . . . . .	35-39
But if Parliament of Scotland (except when in rebellion) upheld the Decreet of Ranking and corrective decreets of Court of Session, not so the House of Lords. When the Glencairn Earldom was claimed in 1797 by Sir Adam Fergusson, standing on the decret of 1648 and the charter of 1488, declared in that decret not to be affected by the Act Rescissory, Lord Loughborough, in advising against him, affirmed that the Act Rescissory cut down the charter of 1488, and that the dignity must be referred to a lost patent, a plea urged and disallowed in 1648. Complications which may arise from this view, . . . . .	39-41
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<i>Résumé</i> of general objections and answers, . . . . .	46, 47

#### SECTION IV.—*Special objections regarding the case of Mar.*

Lord Kellie's preliminary observation not included in the enumeration, that if the dignity of the Earl of Mar were the ancient one, he ought to have been summoned first, . . . . .	47, 48
(1.) That Earl John adduced evidence which related to the fief only, and withheld knowledge of historical facts, and subsequently destroyed documents. Opinions of Lords Chelmsford and Redesdale quoted, . . . . .	49-52
<i>Answer</i> .—No important document withheld, much less destroyed: those specified as withheld were inadmissible, having been declared null and void by service of 1565, Act of 1587, and judgment of 1626. Give list of documents produced from " <i>De jure praelationis</i> ." Impossible to offer chain of more complete proof. Objected, on Lord Camden's rule, that all these documents relate to territorial Earldom. General retour of 1588-9 must be accepted. Lord Camden's rule contradictory of Scottish law: if it had any foundation, the greater number of peers in	

1606 had no evidence, the awards proceeding on charters dealing solely with the lands, . . . . .	48-54
Documents alleged to have been suppressed which would have necessitated the awarding of precedence from 1565 only if produced :—	
1. Charter mentioned in scrap of paper entitled “Memorandum from the Registers.” Could not have been destroyed, as it is a reference to a charter in the Great Seal Register, . . . . .	54, 55
2. The extorted and unconfirmed charter 12th August 1404. Could not have been withheld, as it was placed on the Register in 1476, . . . . .	55, 56
3. A personal peerage patent, suggested to have been granted to Alexander Earl of Mar in 1426, in compensation for his resigning the comitatus. Would presumably have been recorded : but I cannot be expected to do battle with a phantom, . . . . .	56
4. A patent of peerage-earldom, 1565. If existing, must have been to heirs-general, but, for many reasons, it could not have existed. The Lord Lyon, in whose Register it would have been, and Lord Elphinstone, were among the Commissioners, and it would presumably have been in the Great or Privy Seal Register, . . . . .	56-58
Lord Kellie suggests a special grant of precedence ; but it must have been recorded, and why was it not produced ? Impossible to hold that the circumstances of the Mar usurpation, restoration, etc., were unknown to the Commissioners. Question had been gone into in 1587 and 1593 ; and Earl John met the Commissioners in a blaze of light such as attended the claim of no other peer. There is nothing in Earl John’s character to suggest his being guilty of the turpitude now imputed to him by his own descendant. If then there was no suppression of evidence, the Commissioners were not induced through fraud to assign the place they did to Earl John, . . . . .	59, 60
(2.) That the Commissioners pointed out that they did not grant the precedence as that of the old Earldom. According to Lord Kellie, the ranking was not from 1404, but from between 1455 (Earl Marischal’s creation) and 1458. According to Lord Redesdale’s speech, the ranking proceeded on a fancy title commencing with Isabel (1404). According to Lord Redesdale’s later view, as in a letter to the <i>Times</i> , expounded in one to myself, his ranking was 1457, the date being that of an Earldom of Mar granted to a son of James II. ; and Mar was thus placed below Erroll and Marischal created in the middle of the fifteenth century, . . . . .	60-66
In vindication of precedence awarded, viz., from 1404, with inferences therefrom, I stand on Scottish law as in 1606, as the contemporary of Commissioners now attacked by Englishmen applying rules unknown in Scotland, e.g. that the documents	

produced related only to the fief, and that the decret of 1626 deals only with the fief. That decret stamps the whole documents from 1404, fixing that Sir Robert Erskine became Earl of Mar in 1435 as heir of Countess Isabel—a fact which dominates the evidence in 1606. Had the doubt been between 1435 and 1404, the question would have been immaterial; but I shall now show that the earlier date is right. Act 1587 recognised the descent of Earl John from Earl Robert, successor of Isabel, and, with this Act before their eyes, the Commissioners could not have postponed Mar to Erroll and Marischal—and to Argyle—on the ground of his dignity not being derived from Countess Isabel and from 1404, . . . . .

66-68

A preliminary question suggested—Why did not Earl John claim a higher precedence than 1404? *Answer*.—1. He had in 1588-9 proved his descent from Gratney. 2. His not having claimed a higher precedence is no proof that he was not entitled to it. 3. A bar existed in his moderation and good sense. The first seat among the Earls was pre-occupied by Angus, and it was only after the Earl of Angus became Marquess of Douglas that the next Earl of Mar claimed a higher precedence. The ruling in feftment of 1404 offered a natural standing-point, . . . . .

68, 69

Point of present objection is that the postponement of Mar to Erroll and Marischal, created in 1452 and 1455-8, contradicts my view of a precedence from 1404 and the inference from it. But my opponents fail to notice the fact that Argyle (created 1456-7) is preferred to Crawford (1398). All these difficulties disappear when we appreciate the principles on which these dignities were claimed. While the general rule was that precedence should be awarded according to antiquity, there were recognised exceptions by presumptive right in the holders of great hereditary offices, and the possessors of certain ceremonial privileges. Shall illustrate this by a criticism of the places assigned to the first seven of the Earls, . . . . .

69, 70

1. *Angus*.—Proof from 1398 only, while Sutherland went back to 1347. But he had by special grant the first place and vote in Parliament, and it became a question whether he validly resigned it on being made Marquess of Douglas. He bore the *crown*.
2. *Argyle*.—Created 1457. Would by date of creation have been postponed to Sutherland (1347) and Crawford (1398). But he was Justiciary-General, and bore the *sceptre*.
3. *Crawford*.—Proof from 1398. Would by antiquity have been postponed to Sutherland (1347). Had no great hereditary office. Preference could not be from exceptional influence exerted by the then Earl (the “prodigal Earl”). But placed here from usage of Crawford carrying the *sword*, the third of the honours. Sutherland had never attended Parliament from

time of Robert I. till late in fifteenth century. Perhaps the belief that Crawford was entitled to the Dukedom of Montrose led him to be placed as high as possible among the Earls. Sir David Lindsay's Armorial, . . . . . 72-77

4. *Erroll*.—Creation 1452. Had his precedence over Sutherland and Mar as Constable, . . . . . 77, 78
5. *Marischal*.—Also ranked before Sutherland and Mar in virtue of office, . . . . . 78
6. *Sutherland*.—His charter of 1347 would have given him the first place, but for causes stated, . . . . . 79
7. *Mar*.—Ranked second to Sutherland, in consideration of earlier date (1347) proved by Sutherland. Sutherland's supposed ranking in virtue of new creation 1513 negatived by the fact that the precedence awarded a date avowedly long before 1513, . . . . . 79

Result:—Ranking of first seven Earls proceeded on well-ascertained principles, the first five on grounds independent of antiquity ; and Sutherland and Mar in accordance with antiquity of evidence produced. Decreet not imperfect and erroneous. As Mar precedence stands from 1404, dignity cannot be the alleged new and personal title of 1565 conferred by a lost patent. Why was that patent not produced ? . . . . . 79, 80

To Lord Redesdale's assertion that Earl John was put in the place of an Earl not of the Erskine blood, a Prince who sat in Parliament in 1457, to exclude connection with the old Earldom, I reply that this Prince was then an infant, and could not have sat in Parliament, and such an arbitrary ranking, neither on priority nor precedence, would have been unwarranted by the terms of the Commission. This question is subsidiary to the point, whether the Commissioners were induced, by fraud on the part of Earl John, to assign him a precedence earlier than 1565. Lord Kellie brings the Sutherland and Mar cases into comparison. A point of identity is that Lord Kellie and Sir Robert Gordon have both charged their ancestors with dishonest dealing, defiling their fathers' graves, . . . . . 80-82

- (3.) Six Earls ranked below Mar are said to have prosecuted a reduction of the retour of 26th March 1588-9. Quote Lords Chelmsford and Kellie. In 1622 (as stated in Letter VI.) the Elphinstones (with the officers of the Crown and others) brought a reduction of the retours of 1588-9, to vindicate the grants made by the Crown during the usurpation. The six Earls associated with Lord Elphinstone deny the precedence of Earl John ; but this did not constitute an action of reduction or a legal challenge. A rectification of the Decreet could not be pursued by a side-wind. The process collapsed. But the challenge of the general retour could only be based on the fact of Earl John claiming his right to the Earldom from Countess Isabel. If the

Earldom held by Earl John had been a creation of 1565, and ranked too high, the six Earls would have called for any grant of precedence, to annul it ; but to call for the retour was an acknowledgment that if it stood (as it does under decret of 1626), Earl John was Earl as heir to Isabel. This affords a complete answer to the "peerage-earldom" theory, and knocks Lord Camden's law on the head. The introduction of the six Earls was at the instance of the Elphinstones, to swell the opposition to the retour of 1588-9. The five retours of 1628, connected by Lord Chelmsford with the question of precedency, were but the necessary preliminary step to the process against the vassals of Mar, . . . . .	82-86
Earl John's son in 1639 initiated a series of protests for higher precedency, carried on to 1847. It is impossible to hold that this claim was based on suppression or destruction of evidence. Not a doubt was ever expressed of the line of succession till the pleadings for Lord Kellie. It is significant that Earl John did not protest, though alive, when Angus resigned his right to first vote, . . . . .	86, 87
Observations by Lords Redesdale and Kellie on the ranking of Sutherland as compared with Mar. Lord Redesdale calls my statement that Mar was placed next below Sutherland misleading ; and says both were placed below Erroll (1452). My answer is, that Erroll was ranked above Sutherland and Mar from his hereditary office, as Argyle was above Crawford. Lord Redesdale further asserts that Sutherland did not obtain the precedence "allotted to it by the House of Lords in 1771." But the House of Lords cannot assign precedence : and in this case only reported that the heir-general was entitled to the dignity ; and the Commissioners of 1606, by accepting the charter of 1347, acknowledged the transmission of the dignity through Elizabeth in 1514, . . . . .	87-89
Lord Kellie advances same argument with an inference. Sutherland was ranked according to a supposed new creation, since decided not to have taken place ; and if so, according to my argument as to Mar, the more recent Earldom could still be claimed by the heir-male. But the fact that the award proceeded on the charter of 1347 disproves its having proceeded on a new creation of 1514. The whole theory of peerage-earldoms was unknown in 1606. The logical necessity under which Lord Kellie requires me to make this admission is "an hypothesis built on an hypothesis : " and the arguments which were successful in behalf of Lord Kellie are the only parallel to those unavailingly urged for the Sutherland heir-male, . . . . .	89, 90
A comparison between cases of Sutherland in 1771 and Mar in 1875. According to Lord Mansfield, Sutherland in 1606 took precedence of ten Earls whose interest it was to show a new creation ;	

but so little idea had they of a new creation, that they began a course of protestation for higher precedency. His remarks are equally applicable to Mar. In consequence of nine earldoms having been shown to be descendible to heirs-female (Mar being one), the inference was drawn that Sutherland was a tenth. Substituting Sutherland for Mar, the number would be the same, and the inference identical that Mar was a tenth,	90-93
In answer to Lord Kellie and Lord Redesdale, I have now vindicated the contentions in my Protests that the precedency of Mar in the Decreet of 1606 is incompatible with the Resolution of 1875 : and that that Decreet, corrected when necessary by Court of Session, and supplemented by new creations, became the Roll of Peers down to the Union, and is the Union Roll. I have shown that the Report of 1740 and the abridged Roll of 1847 have no authority ; and that protests for remeid of law before the Court of Session were recognised as valid by the House of Lords in 1708 and 1769. Corrections on the Union Roll can only be made by Court of Session, and neither by House of Lords nor Sovereign,	93, 94
Quotation from Riddell's "Peerage Law" regarding the only authority competent to correct the Roll,	95, 96

## LETTER VIII.

### THE ATTAINDER AND ITS REVERSAL.

Resume thread of story after episode of Decreet of Ranking. The fortunes of the family began to decline under the third Earl John, son of the Treasurer. Fines incurred for loyalty, debts contracted in Royal cause, etc., occasioned sale of nearly all the estates except Alloa. The Earl in 1715 was attainted as head of the rebellion of that year. Attainder reversed in 1824,	97
During this decline and obscuraton two or three circumstances indicate the recognition of the ancient Earldom derived from Isabel and descendible to heirs-general, the modern Earldom of 1565 being undreamed of. These are—	
(1.) The protests for precedency from 1639 to Union, and absence of counter-protests,	98, 99
(2.) The testimony of the family to standing rule of succession in case of divarication between heirs-male and heirs-general, afforded by entail of estates in 1739 after their purchase for family. Friends of family were permitted to repurchase forfeited estates under trust for heirs of house. Purchase completed by charter of 1725, which had been preceded by a back-bond in 1723, and an entail of 1739 narrating the back-bond. By terms	

- of this entail—1. The destination is to heirs-general in preference to heirs-male collateral, of whom the nearest was Lord Grange, himself the principal trustee. The attainted Earl's daughter succeeded under the entail, and on her death, her son, the afterwards restored Earl. 2. It was obligatory on heirs-general, being strangers to the house of Erskine, to adopt the name and arms of the Erskines Earls of Mar. 3. Should the attainder be reversed, the same class of heirs had to adopt the "title, dignity, and honours" of the family. The opinion of Lord Grange as heir-male, a trustee, and a Lord of Session, was thus that the dignity was descendible to heirs-general. That the heir-general was an Erskine and heir-male in 1824 was only a happy accident. All this was overlooked, . . . . . 98-105
- (3.) The testimony of Lord Hailes and House of Lords in 1771, in the competition for Sutherland honours, between Sutherland of Forse and Sir Robert Gordon against the Countess Elizabeth. Gordon's arguments were precisely those of Lord Kellie. Lord Hailes proved that nine out of thirteen Earldoms, Mar being one of the nine, had gone to heirs-general—and this proof, accepted by Lords Mansfield and Camden, ruled the case; all which was forgotten in 1875. Point here is that Lords Hailes, Camden, and Mansfield were in 1771 at one with Lords Grange and Dun in 1739,—and by their concurrent testimony Lady Frances would, but for the attainder, have succeeded as Countess of Mar, and her son, by whatever marriage, as Earl, 105-107
- (4.) All this was in remembrance in 1824, when the restorations were at first limited to lineal representatives of attainted peers. John Francis Erskine, grandson through his mother of the attainted Earl, ranked in this category; and he was restored as "grandson and lineal representative." The Act proceeded on a report by law officers of Crown, certifying his descent through his mother, which Lord Mar was not permitted to adduce in 1875, although a similar report had been allowed to be adduced in the Nairn case in 1874. Had the title been descendible to heirs-male it would not have been included among the dignities then restored. Observations on this subject in my *Protests*. Remarks of Lords Chelmsford and Redesdale subjoined with comments, . . . . . 107-111
- (5.) All this was unimportant compared with the renewal immediately after the restoration of the protests for the first place among the Earls, without any counter-protests—which could not have been the case had the reversal proceeded on the theory of a new creation from 1565. Act of 1824 has been unwarrantably turned against heir-general, . . . . . 111, 112
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## LETTER IX.

## LORD KELLIE'S CLAIM, AND RESOLUTION OF 1875.

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- ON death without issue of late Earl of Mar in 1866, John Francis Erskine Goodeve, his sister's son, became lineal heir and representative of the restored Earl of 1824, of Lady Frances, of the attainted Earl, of Earl John, restored in 1565, of Earl Robert, and Earl Gratney. The succession passed to a new family, the common lot where female succession prevails. The male representation of the house of Erskine at same time devolved on late Earl of Kellie, who in 1872 was succeeded by his son, the present Earl. The heir-general assumed the dignity of Earl of Mar, which devolved on him *malgré lui*. Lord Cairns's expression of sympathy does not go to the root of the matter. He succeeded precisely as if brother's son, entered into possession, and is entitled to recognition until the heir-male establish a preferable right by exception, . . . 114-116
- The Earl of Kellie claimed the Earldom of Mar, not the ancient dignity, but one alleged to have been created in 1565. Lord Mar petitioned the House, under his own title, for leave to appear, which was obtained. He was afterwards ordered to expunge the title of "Earl of Mar" from his Case, and the *onus* of disproving Lord Kellie's claim was illegally thrown on Lord Mar. Lord Kellie's narrative of the two questions before the Committee and of the Resolution, . . . 116, 117
- The answers were based on the traditional rules of the House, but I too put three questions :—1. Are the principles appealed to in my Protests binding ? 2. Has the House of Lords obeyed them ? 3. If not, are they or the traditions of the House to prevail ? The question is between the House of Lords and the law of Scotland and final judgments of the Court of Session before the Union, . . . 117, 118
- Apply two tests to Resolution of 1875 and opinions in speeches ;—their conformity with the views of the Court of Session in 1626, and with the law of Scottish succession, . . . 119, 120
- I. Question turns in 1875, as it did in 1626, on the respective validity of the confirmed and unconfirmed charters. If the charter of 12th August 1404 prevails, the Crown was justified in resuming the fief and dignity in 1435 ; Queen Mary wrong in holding that the Erskines had been unlawfully excluded : and her so-called restitution was a new and uncalled-for grant. If the charter 9th December 1404 prevails, the reverse follows : Queen Mary's charter was a restitution. John Lord Erskine was replaced ; the succession continued in the line of heirs-

general, and the heir-general is now Earl of Mar, while he would have had an equal right under the alleged new creation, had it ever existed. What is the test of validity between the two charters? . . . . .	120, 121
1. No alienation of a fief held of the Crown is valid unless confirmed. The charter 12th August 1404 being unconfirmed was invalid. The charter 9th December 1404 was confirmed and valid—recognised as the only legal conveyance in 1565, 1587, 1606, 1771, and 1824, . . . . .	121
2. This view is enforced in 1626 in the suit against the Elphinstones, when the Court sustained the charter 9th December as against that of 12th August; and the question, when brought up again in 1875, was therefore <i>res judicata</i> , . . . . .	121-123
II. Apart from judgment of 1626, the Lords were equally bound to report against Lord Kellie by the law of succession as expressed in the Oliphant case, and testimony of Acts and institutional writers, . . . . .	123
It stands out therefore that the House of Lords overlooked the decret of 1626, and accepted the charter of 12th August 1404: what the Court of Session rejected in 1626 the House of Lords accepted in 1875, . . . . .	123, 124
Steps by which they reached this conclusion:—1. By Lord Camden's law they removed the charter of 23d June 1565 out of the field as a grant of dignity; 2. A new creation presumed; 3. By Lord Mansfield's law they presumed the limitation to have been to heirs-male of the body, . . . . .	124, 125
Propagation of error by error illustrated by Lord Redesdale's argument regarding the barony of Erskine, . . . . .	125-127
Resolution in direct opposition to the advice of law-officers of the Crown, who held that even were there a re-creation in 1565, the circumstances indicate the intention that it should descend to heirs-general, . . . . .	128, 129
The Resolution and its <i>rationes</i> are at daggers-drawn with the decret of 1626 and the law of succession generally as protected by the Treaty of Union—Which is to prevail? . . . . .	129
Effect of Resolution. It can have none on the legal rights of the heir-general. But practically it restores the state of things between 1435 and 1565, declared by Queen Mary in 1565, Parliament in 1587, and the Court of Session in 1626, to have been the result of injustice. In the face of the censure passed by the Court on Alexander Stewart in extorting the charter of 12th August 1404 and resigning when a liferenter in 1426, and on James I. and his successors in appropriating the heritage of the Erskines, the House has acquitted them all, and (so far as they have power) excluded Isabel's representative and given his inheritance to a legal stranger. According to the views of 1875, the Court of Session in 1626, Parliament in 1587, and	

Queen Mary in 1565, were in error as to the law of succession and devolution of dignified fiefs, and the circumstances between 1404 and 1565, it being reserved to the Lords in 1875 to correct the error: the Commissioners of 1606 took an equally false view in favour of Mar, induced by fraudulent suppression and destruction of documents, which all nevertheless reappeared in 1626: and the Court of Session were no less in error in their decret *in foro contentiosissimo* in that last year, ruling that the Earl of Mar was rightful owner of vast property, and entitled to restitution as heir of Earl Robert and Countess Isabel; that their decret might be trodden under foot, and the contention of the defeated parties enforced in the present day. Everything is consistent which springs from the charter of December 1404, everything the reverse which springs from that of August 1404. Lord Mar stands on the former, the House of Lords on the latter—Which is to prevail? . . . . . 129-131

## LETTER X.

## THE HEIR-GENERAL NOT A CLAIMANT.

I HAVE still to exhibit the practical effect of the Resolution on Lord Mar from 25th February 1875 till now; also the action taken by the House of Lords in a series of Orders on the 26th; but shall defer this, and consider two questions suggested by Lord Kellie, viz., By what right did the heir-general assume and bear the title of Earl of Mar, apart from the sanction of the House of Lords and after the Report? and—In what character did he appear before the House on the occasion of Lord Kellie's claim? Lord Kellie's views on these questions are—1. That the assumption was irregular at first, and its continuance is illegal. In an undisputed succession to a peerage no claim is necessary; but a disputed case is different. The logical conclusion of my argument would be that in a peerage no patent for which existed, the heir-male and heir-general might each assume the title, and no authority could dispossess either. In the Cassillis case the Earl of March acquiesced. 2. The heir of line is called by Lord Kellie the "defeated" or "disappointed claimant;" and it is said that his Additional Case was ordered to be amended by inserting the words "claiming to be" before Earl of Mar. Lord Hatherley spoke of the absurdity of admitting him to be Earl of Mar, and called him a claimant (words which could not make him one without a petition to the Crown; more generally he was called "opposing petitioner"), . . . . . 132-135

My two Protests quoted and vindicated against these objections, 135, 136

1. As to Lord Mar's status as Earl, my answer was anticipated in second Letter. There is no distinction as to descent of lands and honours, except that dignities passed *jure sanguinis*. In landed heritage a maternal nephew succeeds his uncle unless excluded by settlement or collateral heirs-male—and in dignities in like manner. *Onus* lies on heir-male to prove the exception: till proved, the heir-at-law is in possession: and the indefeasibility of dignities is unknown in Scotland. Apart from this general law the question is *res judicata* from 1626. There is nothing to interrupt the immediate devolution on the heir-general. Its descendibility to heirs-male as a creation of 1565 was repudiated by Lords Mansfield and Camden in 1771. If the restored Earl of 1824 was not restored in right of his mother, the Crown, Ministry, Parliament, all concurred to pass an Act whose *ratio* was at variance with the status of the beneficiary. The case of the Earl of March illustrates the general usage. The complication supposed in the event of two competitors proceeds on the fallacy that the assumption of the title would be equally competent to the heir-male with the heir-general. Lord Rosebery's Resolution of 1822, that a nephew succeeding to his uncle must apply for recognition to the House of Lords, was *ultra vires*, and rescinded. A maternal nephew being next of kin is equally entitled to succeed with a paternal, . . . 136-139
  2. The representation that Lord Mar was a claimant is a fundamental error. Quote Protest, and Lord Chelmsford in Wiltes claim as to value of speeches in Committees of Privileges. Lord Mar has never petitioned the Crown—no petition of his has consequently been remitted by the Sovereign to the House. Lord Kellie's claim is to a modern and distinct Earldom. Lord Mar only asked and obtained leave to oppose that claim; but did not compromise his status or confer on the House any right to adjudicate on the ancient title. The Duke of Montrose might as reasonably have been called a claimant in 1853. The Committee, under the influence of the traditional rule as to Scottish dignities, disallowed Lord Mar's title, ordered him to expunge it, transferred to him the *onus* of proof: but Lord Hatherley's calling him a claimant could not make him one. He had to choose between appearing in a degraded capacity and abandoning his rights, . . . 139-141
- My answer to Lord Kellie's two questions therefore is:—1. The heir-general can no more be other than Earl of Mar than Lord Kellie can be other than Earl of Kellie: the House had no authority to determine that he was not Earl of Mar, the Report being confined to the claim to the Earldom of 1565. 2. He never submitted his claim to the old dignity to the Sovereign, nor claimed a dignity whose existence he denies; and he is therefore not a claimant, . . . 141, 142

Lord Kellie and his friends proceed on the impression that mere opinions expressed in Committee and never reported to the Sovereign amount to a judicial decision ; and it is also on this theory alone that the Orders consequent on the Resolution of 1875 can be accounted for. According to the law laid down in the Banbury case, the denial of Lord Mar's right as a peer, and any action taken on it, is nugatory in law, and *a fortiori* inasmuch as it is matter of option to the claimants to Scottish peerages whether they submit their pretensions to the Crown or to a legal tribunal, . . . . . 142, 143

## LETTER XI.

### ORDER TO LORD CLERK REGISTER AND ITS RESULTS.

#### SECTION I.—*Orders passed on Resolution of 25th February 1875.*

The Resolution in favour of Lord Kellie was adopted 25th February 1875, and next day the House initiated the action which has led to Lord Mar's exclusion from his place at Holyrood and Lord Kellie's propulsion into it, an action proceeding on views expressed in Committee, which were no part of the Resolution, and cannot be imported into it in prejudice of one who is no claimant, and in legal possession. The Lords have since disavowed the theory on which this action proceeded ; but the action remains in force. Lord Kellie narrates the three Orders of the House of 26th February 1875, namely, that the Resolution be reported to Her Majesty, that it be transmitted to the Clerk Register, and that the Clerk Register receive the vote of the Earl of Kellie as Earl of Mar ; and he adds that these Orders make the Protests unavailing, . . . . . 144, 145

The second and third Orders were *ultra vires* for two reasons, . . . . . 145

1. As issued prematurely, before the Report had been made to the Sovereign, and under an unwarranted assumption that the Sovereign would approve. After reporting the Resolution under the royal reference, the House is *functus officio*. These Orders were therefore an invasion of the Queen's prerogative, whose assent could not be presumed on in any case, and least of all where the Resolution was in contradiction to the opinion of the law officers of the Crown. Her Majesty might have referred Lord Kellie's petition back to the House for further consideration, or taken the advice of another tribunal. The precipitancy of the Order precluded remonstrance by the heir-general. It is no answer that the provisions for justice at the foot of the throne are obsolete ; Lord Chelmsford did not hold

- them so in the Wiltes case, and they are the only security against the autocracy of the House of Lords, . . . 146, 147
2. The third Order tampered with the Union Roll, intruding Lord Kellie as Earl of Mar of 1565 into the place of the ancient Earldom of Mar, occupied by another *jure sanguinis*, by the Restoration Act of 1824, the recognition of 1771, and decret of 1626; an Earldom which Lord Kellie had not claimed, and on which the House had not reported, giving Lord Kellie precedence over nine Earldoms created between 1404 and 1565. The House has since disclaimed the power to do this, . . . 147-149

## SECTION II.—*Proceedings at Election of 1876.*

- The Order first made itself felt at the Holyrood election of 1876, where the popular prejudices on the subject were brought into prominence. Scene dramatic. Meeting of true heir and false; former with a few sympathisers, latter in full blaze of success, supported by the Duke of Buccleuch, Marquess of Lothian, and Lords Elphinstone and Saltoun, . . . 149
- Lord Lothian called attention to the presence at the Peers' table of a gentleman decided by the House of Lords to be a commoner. Duke of Buccleuch remarked that it was unusual for a claimant to take his seat with those who were in possession. Lord Elphinstone, seconded by Lord Saltoun, moved that "Mr. Goodeve Erskine" leave the table. Lord Mar asserted his status as Earl of Mar, that he had already voted, and that he made no claim to the Earldom adjudged to the Earl of Kellie. Views of the Lord Clerk Register in misconception of his position. Question of his sitting at the table, how settled, 149-152
- Both Lord Mar and Lord Kellie offered to vote as Earl of Mar; Lord Clerk Register refused vote of former. Protests were lodged against Lord Kellie's vote by Earls of Morton, Cassillis, and Caithness, as prejudiced in their precedence—and by Marquess of Huntly and Lord Napier on more general grounds. My own Protest, . . . 153, 154
- The Lord Clerk Register observed that he had no choice but to obey the Order of the House of Lords; and the Duke of Buccleuch, that the Peers could not go into the questions raised by the Protest. The Duke was right, but he did not apprehend the *ratio* of Protests as grounds for subsequent proceedings before the Court of Session. Lord Mar asked leave to read a Protest, and spoke in defence of his rights. Lord Elphinstone protested against Lord Mar being allowed to read his Protest—said that the Peers were unanimous in deciding the ancient Earldom to be extinct, alluded to the process regarding the estates under the settlement of 1739 and missing back-bond, and asserted that Lord Mar's presentation at Court

had been cancelled. Further remarks having been made by Lord Saltoun and Mansfield, Lord Mar's Protest was rejected as being signed "Mar," . . . . .	154-158
Lord Rosebery's Resolution and the rescinding of it adverted to by Lord Mar and the Duke of Buccleuch, . . . . .	158-160
Dangerous suggestions by Lord Clerk Register regarding Union Roll. Protest by alleged Countess of Breadalbane received, while Lord Mar's was rejected, . . . . .	160-162
Lord Clerk Register placed in a difficult position between conflicting responsibilities, . . . . .	162, 163

SECTION III.—*Observations on foregoing proceedings.*

1. All, including Lord Mar, assumed that the House of Lords had jurisdiction in dignities as a court of justice, in oblivion of the prerogative of the Queen; and further overlooked the fact that it is only by allowance of claimants to Scottish dignities that their claims come before the Crown at all, . . . . . 163, 164
2. The Lord Clerk Register, the Duke of Buccleuch, etc., insisted that Lord Mar had been a claimant, and an unsuccessful one, notwithstanding his clear representation that Lord Kellie only had been a claimant, that he had claimed neither Earldom, and that no adjudication had passed against him. This arose from inadvertence of the fact that the Lords can neither offer an opinion nor take action as to a dignity but by reference from the Crown. It will be seen that the Select Committee of 1877 recognised that there had been no decision against the heir-general, agreeably to Lord Mar's contention. And if Lord Mar is thus justified, how much does not the view urged against him at the election need justification! . . . . . 164, 165
3. Lord Mar did less than justice to himself in admitting that the supposed Earldom of 1565 would vest in the Earl of Kellie—an admission the result of Lord Mansfield's law, . . . . . 165
4. If the third Order was *ultra vires*, so were the proceedings at the election, which can infer no prejudice to Lord Mar or other Peers. But cruel as was his position and treatment, the man most to be envied was Lord Mar, who, in the most trying circumstances, with few sympathisers, stood up to defend his inheritance and the rights of the Scottish peerage. Having verbally protested, he has since abstained from voting, . . . . . 165, 166
5. No one present had an idea of the force of Protests. They are in sequence to those uttered before the Union, which were received by the House of Lords in 1708, and to others on different occasions in Scottish history. So far from being empty, they are of very substantial weight, . . . . . 166, 167

## LETTER XII.

## RESOLUTION AND DEBATE REGARDING UNION ROLL.

	PAGE
I HAVE to chronicle a debate in the House of Lords, and a Report of a Select Committee, which bring the law of the land and the assumption of autocratic power in regard to peerages into pronounced antagonism, . . . . .	168

SECTION I.—*The Duke of Buccleuch's Resolution.*

The minutes of election and Protests had been transmitted to the House of Lords, and what took place circulated by the press. Lords Kellie and Redesdale determined to take notice of what had passed, the former as affecting his position, the latter to prevent a recurrence of Lord Mar's interposition, and also on broader grounds. Lord Kellie addressed a petition to the House, and the Duke of Buccleuch moved a Resolution in conformity with it. On a debate on 9th July 1877 the Resolution was withdrawn and a Select Committee appointed, which presented a Report on 27th July, containing a recommendation in consequence of which Lord Mar has not since voted, on grounds to be hereafter seen, . . . . .	168, 169
Lord Kellie's Petition prayed the House to direct that the title of Earl of Mar be called in a precedence corresponding to 1565, and not in any other place, the petitioner not desiring a precedency to the prejudice of other peers. But while Lord Kellie disclaimed to profit by the inadvertence of the Order of 26th February, his proposal involved the excision of the original Earldom as well as the interpolation of the new. The Petition was grounded on the allegation that the Resolution of 25th February was unanimous, and that all the Lords who spoke gave opinions that no other Earldom of Mar existed but that of 1565. This allegation suggested the searching question whether opinions in speeches in Committee are judgments or mere <i>obiter dicta</i> . The Resolutions, if they could be imported into it, would affirm the extinction of the original Earldom, and a ground would be suggested for this operation on the Union Roll. The Report of the Select Committee gave no countenance to these views. Behind Lord Kellie's anxiety to be relieved of his pre-eminence they discovered a latent and less generous motive,—to prevent "Mr. Goodeve Erskine" from answering to the title of Mar, wherever called. This they refused to sanction. A declaration was thus elicited from the law Lords and the House as to the quality and character of opinions in speeches, whether "judgments," . . . . .	169-171

The Duke of Buccleuch's Resolution, as moved on 9th July, was that the title of Mar be called in the precedence to which it is entitled under the Resolution of 26th February 1875, and in no other place; but with a saving to the "Earl of Mar and Kellie" and all other Peers, their rights and places, upon further authority shown, . . . . .	172
By Lord Redesdale's admission this motion was intended—1. To confirm Lord Kellie's position. 2. To bridle the freedom of action of Scottish Peers at Holyrood, in revival of the control exercised last century. Concluding salvo an after-thought, denoting an impression that there was a risk of going too far—a change of front betokening coming defeat on the main question. Even Lord Redesdale in his speech and in a letter to the <i>Times</i> acquiesced that the heir-general might make good his right to the old Earldom; and Lord Kellie's agents, writing to the <i>Times</i> , participated in this view. Lord Kellie's friends, who at first maintained the original Earldom to be adjudged to be extinct, became conscious before 9th July that the question was an open one. In his recent letter, however, Lord Kellie insists that the judgment of 1875 extinguished the original Earldom; but the House of Lords has in 1877 recognised it to be an open question, . . . . .	172-176

SECTION III.—*Debate of 9th July 1877.*

This debate, with the Report of the Select Committee that sprang out of it, determined the attitude of the House for the present generation as to the extent and limitation of its intervention in peerages, the House retracing its steps towards a juster appreciation in some matters, but in others plunging deeper into error. The favourable points included a repudiation of the power of legislation (alone), and the unfavourable arrogation of a jurisdiction in dignities exclusive of the Sovereign, due to autocratic traditions never before crystallised, and the acceptance of an Act of 1847, which will be shown to be unconstitutional. The lay Peers spoke first, including Lord Redesdale, the special exponent of the views which the House was called on to enforce, . . . . .	177, 178
The Duke of Buccleuch represented the Resolution as carrying out what is usually done at once, viz., sending an Order to the Lord Clerk Register to insert the peerage according to its proper place on the Roll, that place being 1565, and alleged various precedents. The saving clause would prevent interference with other peerages, <i>e.g.</i> with a claimant of the ancient Earldom of Mar. He spoke in depreciation of the Decreet and the Union Roll, . . . . .	178
Lord Huntly observed that the precedents were all of peerages	

- added, not struck off ; to strike off the ancient Earldom would be *ultra vires* of the House, . . . . . 178, 179
- Lord Redesdale said that the House having come to a Resolution (that of 1875) as to the date of the Earldom of Mar, it is according to custom to order that peerage to be called as of that date. The present Resolution does not strike a peerage off the Roll, only says it shall not be called as of a certain date, and why? because there is no such peerage of that date. There never was an Earl of Mar sitting in 1457 (not very consistent with the admission that that peerage might yet be claimed). The Committee for Privileges, with evidence never brought before the Commissioners or any other tribunal (what of decret of 1626?) determined that the first Lord Erskine who was Earl of Mar took his seat in 1565. Referring to my having called in question the jurisdiction of the House, he said that the House has always held that it is the only tribunal to determine the right to a peerage. A claim was put forward by a person not nominally a claimant that the Earldom dated, not from 1565, but a much earlier period, but he could show no ground for it ; the decision was that that was the only date of the Earldom of Mar, no one having sat as Earl from 1377 to 1565 who could claim descent from the ancient Earls. It was the decision of the House, right or wrong, that there was a new creation in 1565. What grounds are there to justify the proposition that the House cannot order a peerage found on the Roll to be called at a different date? Our doing so is the natural consequence of the Resolution come to in 1875, . . . . . 179-182
- Lord Mansfield stated that there were precedents for putting peers higher, but not lower : noticed the description of Lord Kellie and Lord Mar as "rival claimants," pointed out that the latter succeeded in course of law to his Earldom, which has not been claimed by the former, and retains it, and every Scottish peer is in the same position. The Committee for Privileges found that Lord Kellie had proved his claim to a peerage of 1565, but said not one word about the peerage of 1404, which remains intact. The decision of 1875 was however an extraordinary one, as the peerage of 1565 was unheard-of before, and is unsupported by a scrap of evidence, except the postscript of a letter of Queen Elizabeth's envoy, Randolph. Then, instead of the Resolution of 26th February being first reported to the Queen, to take the Queen's pleasure on it, it was at once sent down to the Lord Clerk Register. Lord Mansfield vindicated the Decreet of Ranking as founded on the evidence produced, and containing a reservation of process before the Court of Session : and alluded to the charter mentioned by Selden. The proposal now made was to strike out the Earldom of Mar as of its date, and insert it as an Earldom of 1565, because "they have got into a

mess with their Orders." The Committee came to an erroneous conclusion, and must have taken immense pains, because it is difficult to give a judgment when all the facts are against you. It was remarked as curious that the Committee did not consult their legal advisers upon the law of Scotland: had they done so they would not have known that the non-assumption of the title immediately after the charter of 23d June 1565 was the necessary result of the delay in getting infeftment. The matter ought to have been referred to the great tribunals in Scotland; instead of which it was in defiance of the opinions of the law officers of the Crown that the Committee arrived at their conclusion, . . . . . 183-187

The law Lords, Lords Cairns and Selborne, then spoke, and their views, checked by the Report of the Select Committee, must be considered those of the House, the question whether they are just remaining in the background. Both speeches were in depreciation of the proposed Resolution. Both Lords agreed that its adoption would commit the House to assume a legislative power which it did not possess. Lord Selborne was opposed to the *salvo*, as weakening the effect of the Resolution of 26th February 1875; while Lord Cairns thought the *salvo* made it less objectionable than at first. Both made it the basis of discussion that the decision of 1875 must be final, right or wrong. Lord Selborne declined to enter into its grounds with Lord Mansfield, and Lord Cairns said that it was not the custom to admit argument in opposition to a decision which the House has come to. (The true reason against re-discussion was that the House, after reporting, was *functus officio*, and the ultimate adjudication rested with the Sovereign), . . . . . 187-189

Lord Selborne founded his opposition to the Duke of Buccleuch's Resolution on two grounds:—1. That it was inconsistent with what was resolved in 1875; and that, if carried, it would not support the authority of what was then done, but discredit it. 2. That its acceptance would commit the House to the assumption of jurisdiction as to Scottish peerages and the Union Roll not hitherto exercised, . . . . . 189, 190

1. In support of the first point in the first ground, he said that the Order to call the title of Mar in its place on the Roll was different from ordering it to be called according to date of creation (a just distinction). On the second point of that ground he was less happy; and in his anxiety to fortify the Resolution he imported the reasons into it. Although, he said, the decision does not embody its grounds (thus assuming that the House of Lords is a court of law delivering judgment), yet its ground was that in 1565 no Earl of Mar existed of earlier date, and that the ancient Earldom had not been restored by the means till then supposed to have restored it. It virtually

therefore asserted that there was only one Earl of Mar since 1565, and created that year. There had always been an Earl of Mar on the Union Roll; and his place, if there were only one, was the existing place. The precedents adduced by the Duke of Buccleuch are not to the purpose; and his Resolution does not direct erasure of the old title and introduction of the new, but that the title of Mar should be called according to its date of creation, *i.e.* 1565. The more ancient peerage would rank in the earlier place, a second one being introduced, thus encouraging the idea that there were two Earls of Mar (Lord Selborne overlooking the words "in no other place"). His attempt to import the opinions into the Resolution is at variance with principle; and his anxiety to exclude the reopening of the decision by recognition of an existing Earldom of the old creation, led him nearly to the adoption of the expediency doctrine of 1762 and 1771. The maxim "*In dubiis benigniora semper sequenda sunt*" might have been expected to rule. The Report of the Select Committee adopts the more favourable view, and repudiates the importation of the speeches into the Resolution, 191-193

2. Lord Selborne's second point was supported by cogent reasoning. No precedent exists for changing the precedence of peerages, and it would be against the spirit of Acts of Parliament. In the Decree of Ranking, the right of appeal was to the Court of Session. He cited the Parliamentary confirmation of the Decree obtained by the Countess of Buchan before the Court of Session. He illustrated the danger of assuming the office of rectifying the ranking of peers by the cases of Sutherland, Erroll, and Crawford, and suggested the possibility of Queen Mary having granted a higher precedence than 1565 (but such a grant had it existed would have been produced in 1606). Vindicating the authority of the Union Roll by the testimony of the Act of 1847, he remonstrated against taking away a precedence enjoyed for more than two centuries. Referring to the way in which the House had formerly acted, he alluded to the application to the Court of Session to return a revised Roll, with the omission of attainted peerages, in 1739; to Lord Rosebery's Resolution of 1822, and its rescinding in 1862; to the fact that while a Select Committee in 1832 recommended that the Lord Clerk Register should be directed to make out a new Roll, the House refused to assume that power, and in 1847 an Act was passed (correctly referred to as showing the limitation of the action of the House) whose provisions and those of the Act of 1851 Lord Selborne recited. The former Act provides—1. That no peerage be called in right of which no vote has been received since 1800. 2. That if a vote in respect of any title be disallowed, the House may order that such title shall not be called till some

right to it be established; but here (said Lord Selborne), without anything in the Act to warrant it, we are asked to order that the title of Mar now on the Roll shall not be called where it stands. 3. That protests should be transmitted to the House, who might order the person protested against to establish his claim "under the same rules as apply to ordinary claims." (Whereas "ordinary claims" are preferred to the Sovereign, who may refer them to the House of Lords or any other tribunal, this unprecedented provision is that they be investigated by the House of Lords without any reference.) 4. That when a peer has established his right, and the same has been notified to the Lord Clerk Register, the Lord Clerk Register shall not during his life allow another person claiming the same peerage to vote till otherwise directed by the House. (This cannot apply to Lord Mar if his right is, as said by Lord Selborne, absolutely negatived by the decision of 1875.) Then the later Act of 1851 provides that titles in right of which no vote has been received for fifty years shall not be called till the House directs. (Under this Act the House may order the Duke of Rothesay not to be called.) Lord Selborne's induction however is admirable, the respect or disrespect due to the Act of 1847 having nothing to do with his argument. His closing words, 193-201

Lord Cairns, while agreeing with Lord Selborne that the Resolution of 25th February 1875 must be supported, rightly declined to import into it a declaration inimical to the heir-general. There was no petition from any one claiming the original Earldom, the House had not been empowered to express an opinion regarding it, and the Resolution fell to be construed with rigid severity in the interest of any one who could be injuriously affected by it. But while alluding feelingly to the position of the heir-general, he qualified him as a "claimant." Had he been so, there would have been some ground for Lord Selborne's importation of the speeches into the Resolution. Under that alternative the *salvo* of the Duke of Buccleuch's Resolution ought to have rendered it not less but more objectionable, as opening the way to two Earls of Mar, . 201-203

Lord Cairns thought a saving of the rights of the peers of Scotland made the Resolution less objectionable, but it was still too like a judicial or legislative declaration under the guise of a Resolution. We ought to be careful not to go beyond what the decision was. He opposed the Resolution on two grounds, . 203, 204

1. Whether the Order of 26th February 1875 meant to call the Earl of Mar according to the place of a peerage of 1565, or left the Lord Clerk Register to judge of its precedence,—that Order being entirely affirmative, the proposed Resolution, supplementing it with something different and higher in operation—would be virtually a judicial decision, . 204, 205

2. It would be a meddling with the Union Roll, which could not be done except by Parliament. That Roll is declared to be of authority by the Act of 1847 (both law Lords overlooking all deeper grounds). Peerages have been added to it by the House of Lords, but none subtracted, and no alterations in precedence made. (Excellent so far as it goes, but the Union Roll rests not on anything done in 1707, but on the Decreet of Ranking as corrected by the Court of Session.) Lord Cairns drew the same inferences as Lord Selborne from the Act of 1847. Under this Act the House sat in judgment in the case of Lord Colville of Ochiltree, passing a Resolution that that title should never be called again. (What would be the position of the rightful claimant to such a peerage should he appear subsequent to such a Resolution?) If an Act of Parliament was required to do this, you cannot in the present case act by Resolution. Lord Cairns concluded by suggesting the withdrawal of the Resolution, and appointment of a Select Committee, . . . . . 206-208
- Lord Denman added a few words, and it was agreed that a Select Committee should be appointed, . . . . . 208, 209

## LETTER XIII.

### SELECT COMMITTEE OF 1877.

- MEMBERS of Select Committee enumerated. They met 23d, and adjourned to the 27th July, on which day the Report was ordered to be printed. Its title is misleading. Its appendix gives the Roll actually used at Holyrood, but not the Union Roll or Decreet of Ranking; the Report on which the Act of 1847 was framed, the Report of 1832 containing the impracticable recommendations commented on by the Lord Chancellor; a return of Peers who have voted since 1800; Lord Rosebery's Resolution of 1822, but not the Duke of Buccleuch's Resolution cancelling it; nor the Acts of 1847 and 1851, . . . . . 210-213
- Act of 1847 (10 and 11 Vict. c. 52), . . . . . 213-216
- Act of 1851 (14 and 15 Vict. c. 87), . . . . . 216, *note*
- Report of Select Committee of 1877, . . . . . 216-220
- By this Report the House approved the views of Lord Selborne in part, and Lord Cairns in whole. Its special feature is that, while recognising the Earldom as a new creation in 1565, it admits that the heir-general may have a right to the ancient Earldom, and points out a mode by which he may bring his case directly before the Lords, not suggesting, however, that he should petition the Crown. Its spirit was so far favourable, giving expression to the growing feeling that the Resolution of 1875 did

not necessarily extinguish the original Earldom, and that there might be two Earls of Mar, a possibility which I cannot admit, 221, 222

Lord Mar's case has, however, been rendered more embarrassing by a misconception of the powers conferred by the Act of 1847. A Peer, by the law of Scotland, who has never claimed, nor required to claim, the dignity of which he is in legal possession, whose status is unaffected by anything done in the House of Lords, has been placed in the position of being compelled to abstain from his right of voting, lest he should be dragged by two protesting peers before the House as a judicial tribunal, with the certainty that, till it abjure its traditional rules, it will decide against him, or, in the event of his non-appearance, expunge his title from the Roll under that Act, erroneously supposed to be applicable to his case. The house of Mar has been replaced in the position of the heirs of Countess Isabel between 1435 and 1565, the Earl of Mar of 1875 standing in the same situation as Earl Robert, who had been served to Isabel in 1438, whom Parliament in 1587 and the Court of Session in 1626 recognised. It is to be hoped the period of iniquity may not last so long as that which Queen Mary put a stop to. Is it beyond hope that Her Majesty may intervene in the spirit of her ancestress? The refusal to receive Lord Mar's vote affects the privileges and independence of the Scottish Peers, and Her Majesty may well ask the reason, . . . 222-224

Good faith of all concerned affirmed in my paper, which Lord Redesdale criticised in the House before the change of opinion which found expression in the *salvo*. A step in approximation to better things has been taken; and it needs but one step further—an acknowledgment that Lord Mar is under no necessity of claiming what he is in possession of, to enable him to tender his vote. Meanwhile the Act of 1847 hangs over his head, 224, 225

## LETTER XIV.

### THE ACT OF 1847 (10 AND 11 VICT. c. 52).

THE import of this Statute as bearing on the Earldom of Mar, and on the privileges and independence of the Scottish Peers, cannot be appreciated without ascertainment of its origin, sanctions, authority, and validity, . . . . . 226

#### SECTION I.—*Report on which the Act proceeded.*

Annoyances had arisen from the tendering of votes by pretenders to dormant and extinct titles. Further than protests, the proper

remedy, an application to the Court of Session, was not thought of. The chief cases were those of Crawford, Humphreys, and Colville of Ochiltree. A protest by the Earl of Selkirk in this last case led to the inquiry and legislation of 1847. A Select Committee being appointed, the evidence was taken of Mr. Russell, Clerk of Session, and Mr. Robertson, peerage agent. The latter, bred under the <i>dicta</i> of 1762 and 1771, whose keynote was the absolute authority of the House of Lords in Scottish peerages, was a very unsafe guide ; and, unfortunately, the Lords of Session and law officers of the Crown for Scotland were not applied to, . . . . .	226-228
Mr. Robertson's examination, . . . . .	228-230
Report of the Select Committee of 4th June 1847, . . . . .	231, 232

## SECTION II.—*Act not applicable to Lord Mar.*

Were Lord Mar to descend from his place of legal possession to the bar of the House as virtually a claimant, through the operation of a protest by two peers and a summons by the House under the Act of 1847, this step would be unavailing in law, as he does not come within the category of persons to whom the Act has reference, and the same reason (I mean in law, not in practice) precludes the Act being enforced against him. The class of pretenders to dignities to whom the Report refers is further emphasised in the preamble to the Act, . . . . .

233

It may be suggested that Section III. is independent of the preamble ; but either view is almost equally inimical to the applicability of the Act:—1. If the Act is governed by the preamble, the latter refers exclusively to peerages “dormant or extinct,” and “for some time dormant,” and persons who “had no right” to those dignities. The Earldom of Mar, old or new, has never been “dormant or extinct,” much less “for some time dormant ;” as the present Earl succeeded *jure sanguinis* to his uncle by law, besides being recognised everywhere till Lord Kellie's claim, and the succession of the Earldom restored in 1824 has never been interrupted. 2. If the Act is not governed by the preamble, it follows any two peers may protest against the vote of a third, and thus empower the House to order the peer in possession (even the Duke of Rothesay) to appear and establish his claim before the House ; and failing his doing so, to order that his title shall not be called. There are peers regarding whose right doubts have been entertained by lawyers, and such a course might conceivably be adopted in reference to them, a danger which the evidence of Mr. Robertson shows had been foreseen. The framers of the Act could not have intended to put such power into the hands of the House, unchecked by words limiting its exercise to the case of

pretenders ; and if they did so, the enactment was <i>ultra vires</i> even of Parliament, . . . . .	234-236
Had the Select Committee of 1877 deliberately read the Act of 1847, they would surely have seen that Lord Mar's case does not fall within its terms. The private rule of the House could not be enforced against the law of Scotland in a cause not brought before the House by a reference from the Crown, . . . . .	236
A constitutional objection to the Act of 1847 to be noticed later, . . . . .	237

## LETTER XV.

## RESULTS OF DEBATE AND REPORT OF 1877.

The Debate of 9th July and Report of Select Committee have been considered chiefly with reference to the Earldom of Mar. But they have a broader scope as determining the attitude in which the House of Lords stands with regard to claims to Scottish dignities and the right to vote at Holyrood. Proximately, the propositions laid down in 1877 have an unexpected bearing on the validity of the Resolution of 1875, cut away its ground, and clench my argument in support of Lord Mar's possession of the ancient and only Earldom, . . . . .	238
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SECTION I.—*Questions of principle evolved.*

The following searching questions of principle were suggested by the Petition of Lord Kellie, the Duke of Buccleuch's Resolution, and Lord Redesdale's appeal against my Memorandum:—	
1. Are opinions in speeches to be imported into the Resolutions so as to broaden their significance? 2. Are the Resolutions adopted by the House final and irreversible, whether right or wrong? and are they to be interpreted benignly or the reverse? 3. Can the House act on a Resolution without waiting the approval of the Sovereign, and in exclusion of his right to reconsider the decision? 4. Is the House a court of law, with exclusive jurisdiction in dignities, or a commission of inquiry to which or to any other advisers the Crown may refer claims? 5. Can a peerage claim come before the House except by reference, and can the House pass sentence on rights to peerage apart from such reference? 6. In a word, is the ultimate jurisdiction in the Sovereign or the House of Lords? 7. If the House possesses the right of jurisdiction as a Court of law, has it a legislative power in connection with peerages, as involved in the right of voting at Holyrood?—a power enabling it to supersede the law of Scotland by private rules, alter the Union Roll, or otherwise interfere at elections, . . . . .	238-240
Categorical answers could not be expected from the law Lords	

on these points ; but while confining themselves to the issue before them, they laid down uncompromising propositions on the leading points, and indicated responses to the others. As to whether opinions formed part of the Resolutions, Lord Selborne held that they did, Lord Cairns that they did not, and the Report that they did not, . . . . .

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The fundamental propositions which the House laid down were :—

i. That the House has absolute jurisdiction in dignities, irrespectively of the Sovereign ; and their decision is final, right or wrong. But the opinions in the speeches, even when expressing the *rationes*, cannot be imported into the Resolutions. It follows that the House was justified in passing the Order of 26th February 1875 before receipt of Her Majesty's pleasure.

ii. Legislation being the joint work of the Sovereign and Houses of Parliament, the House of Lords can only act in regard to the right to vote under power conferred by the Legislature, specially by Acts of 1847 and 1851. Any action as to the Union Roll, not being warranted by these Acts, would be *ultra vires*. The House cannot supersede the law of Scotland regarding succession to dignities and right to vote by private rules, nor can it reverse a final judgment of the Court of Session regarding dignities. But what it has affirmed to-day it may unsay to-morrow. It is however more difficult now than formerly to adopt a retrograde step in presence of the public ; and in some important points the House has advanced towards legality, . . . . .

240-242

Answers to the seven questions indicated, with corollaries and practical results, . . . . .

242

1. Opinions, not forming part of a Resolution, cannot be termed "judgments." If the speeches of Lord Hardwicke and Lord Mansfield were "judgments," so was that of Lord Marchmont in vindication of the law of Scotland. The *salvo* in the Duke of Buccleuch's Resolution would have been inadmissible, had the speeches in the Mar claim been part of the judgment. Lord St. Leonards was wrong in 1853 in pressing the speech of Lord Loughborough in the Glencairn claim as a final judgment, 242, 243
2. A Resolution affirmed by the House is a final and irreversible judgment. Against this I would suggest that decisions flagrantly against law cannot be final, as for every wrong there must be a remedy ; there can be no writ of error till the House of Lords has been recognised as a court of justice in peerage claims, which is not the case, and cannot be the case in Scotch dignities through the Treaty of Union ; and these views exclude any appeal to the Sovereign, . . . . . 243, 244
3. The House can act on the Resolution at once ; that is, the moment that it is approved and ordered to be laid before the Sovereign. The report to the Queen is thus reduced to a form, all power of

inquiry on her part, or petition by aggrieved party, precluded ;  
and I think this procedure *extra vires* of the House, . . . 244

4. The House is thus practically a court of law, not of inquiry ; the Sovereign cannot refer a Resolution back to it for reconsideration, or a petition to any other consultative body. While the Sovereign had in England reserved jurisdiction in dignities, this has ceased, and the House of Lords has invested itself with this jurisdiction. But if this be acquiesced in by the Peers of England, it cannot affect those of Scotland, who have never been under obligation to resort to the Sovereign, . . . 244, 245

5. If the report to the Crown be a formality, the words of reference are a mockery, . . . 245

6. The ultimate jurisdiction is in the House of Lords, not the Sovereign, . . . 245

7. *Per contra* : The House has no legislative power as regards determining claims to dignities, the right to vote at Holyrood, or precedence on the Union Roll, and can only act under power conferred by the Acts of 1847 and 1851. Whence follow two corollaries :— . . . 245, 246

i. General Resolutions affecting dignities legislatively, *e.g.* Lord Rosebery's of 1822, have been *ultra vires*, and if any such now exist they are null and should be rescinded. The usurpation by which they were passed is now acknowledged and repudiated ; and their application has been illegal. If in supersession of law they are condemned *a fortiori*, . . . 246

ii. General rules as to peerage claims laid down by the House have no legislative sanction, and are null, with all that has followed on them, when in opposition to the law of the land, *e.g. a.* The presumption in favour of the heir-male in Scottish peerages, where the charter is lost, and no collateral evidence exists. When enforced to the injury of the heir-general, as in 1875, it is difficult to see how the decision can be vindicated even by the House. When words have been introduced into Resolutions to mark and enforce the rule, they are interpolations, forming no part of it. *b.* The power to overrule final judgments of the Court of Session, such as those of 1626, 1648, and 1633, is struck at by this disavowal of legislative power. *c.* Lord Camden's rule that a charter of comitatus not specially conveying the dignity, is a mere grant of lands, . . . 247-249

General result : Much that was nebulous has been fixed, in some points favourably, in others unfavourably. The views of the past must be modified, and corrections applied. For remedy, where injury has been done, resort must be had to a competent tribunal, . . . 250

Do. as affecting Lord Mar. He is *primâ facie* in a better position since debate and Select Committee of 1877. Upon the opinions

in the speeches that the old Earldom was extinct, it was considered that the Order of 26th February 1875 might be issued ; but it is now admitted to be an open question whether the ancient Earldom is or is not extinct. Gradual cessation of qualification "claimant" applied to heir-general. Order of 26th February necessarily justified on the ground of exclusive jurisdiction in Scottish dignities, on which ground alone it can be vindicated, as issued before approval by the Queen of the Resolution,	250, 251
Further, the application of Lord Camden's rule to Queen Mary's charter of 1565 was without warrant, and it must be held to carry the dignity ; and the application of Lord Mansfield's rule in favour of heirs-general was without warrant, and Lord Mar succeeded his uncle. On the hypothesis of a new creation in 1565 also, the heir-general inherits under it, as advised by the officers of the Crown. The abnegation of legislative power cuts the ground from the feet of the Resolution of 1875, and vindicates Lord Mar's right in the eyes of the House, as now opened to the limits of its power of action ; and this independently of the acknowledgment that the House cannot supersede the final judgment of 1626,	251, 252

#### SECTION II.—*Act of 1847 defective in authority.*

Beyond its being inapplicable to Lord Mar, there is a fatal flaw in the Act 1847, in consequence of which it cannot legally be applied even to the pretenders against whom it was directed.

1. In England, the jurisdiction in dignities is in the Sovereign ; the House of Lords advises the Sovereign, but does not judge. No prerogative of the Crown can be taken away except by express words in an Act of Parliament. The Act 1847, which attempts to alienate a privilege of the Crown by a side-wind is therefore inept in law. It further proceeds under the fallacy that Scottish claimants and peers are under an obligation to submit themselves to the Sovereign according to the English custom, 252-254
2. In Scotland, jurisdiction in dignities is vested in the Court of Session, and reserved by Article 19 of the Treaty of Union. No infringement of the authority of the Court can be effected except by express enactment, and then only "for the manifest benefit of the people of Scotland." The jurisdiction of the Crown, being purely permissive, cannot be usurped by the House of Lords ; nor can the authority of the Court of Session be affected by disuse. The framer of the Act, in ignorance of the interests they were meddling with, were giving away what was not their own, 254-256
3. The only plea in favour of Act 1847 is, that being an Act of Parliament it must be obeyed. It can only be vindicated by

the assertion of the omnipotence of Parliament. Lord Cranworth's remarks on this subject. Parliament of Great Britain not omnipotent since the Union. Discussion in last Scottish Parliament quoted, as to understanding on which the Peers of Scotland consented to the Act of Union. Word "omnipotence" impious at best, and since the Union inapplicable as against the laws of Scotland, . . . . . 256-258

Two Acts, one of Scotland before the Union (2d February 1707), the other of Great Britain (6 Anne, c. 23), are referred to in 1847 and 1877 as a basis for subsequent interference by Parliament in elections, but have no such import. The Privy Council of Scotland, whose abolition was contemplated when the former Act was passed, was abolished under the latter. The words, "further provision," on which stress is laid, have exclusive reference to the modification in the form of the writ of summons to the Peers, required by the abolition of the Privy Council; but neither Act confers authority for future interference, regulation, and legislation, which Act 1847 assumes to be its own warrant, . . . . . 258-260

These two Acts show:—1. That the election is to be in independence of extraneous authority. 2. That the Lord Clerk Register has only to attend, ask for and register the votes, and report the results. 3. That no power is given to Parliament, still less the House of Lords, to interfere in or regulate elections, take cognisance of rights to vote, or use the Lord Clerk Register as an instrument to control the free action of the Peers. Any such interference is an infraction of an Act declared to be as valid as if engrossed in the Treaty of Union, . . . . . 260

The statement in the Report of the Select Committee of 1847 that the Peerage of Scotland is a body unprovided with means of testing the right to vote, shows their ignorance that the question of the right to vote pertains by law to the Court of Session. *Salvo* at Union as to protests. It could not then have been conceived that a question regarding a right to vote could be decided by any tribunal but the Court of Session. The machinery for preventing the scandals contemplated exists unimpaired, . . . . . 260, 261

The Act of 1847 was passed hurriedly and inconsiderately. It does not appear that the law officers of the Crown were consulted, or any inquiry made as to the law of Scotland. It can only be classed along with the various inoperative remedies attempted by Resolution, and should be erased from the Statute Book. It is a standing menace to subject the Peers of Scotland to a Star-Chamber, from which the Sovereign is excluded; and furnishes a precedent for prostration of the Peers of England, . . . . . 260-262

A few remarks, 1. on the position of the Peers and people of Scotland, as affected by the Mar decision. Quote words of my

Protests. Lord St. Leonards's proposal that claims to ancient dignities should be discouraged by the House by putting a limitation on them. 2. Would it not be wise to return to the constitutional tribunal for deciding claims, the Court of Session? The compact by which the Sovereign arbitrates has been broken by the House enforcing its own rules, and overruling final decisions of the Court of Session: and claimants re-enter their original rights,	262-264
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## LETTER XVI.

### LATER INCIDENTS IN THE CONTROVERSY.

The relative position of Lord Mar and the House of Lords remains unchanged since 1877. Two elections have taken place at Holyrood, and a conversation has taken place in the House of Lords on questions put by the Marquess of Huntly,	265
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#### SECTION I.—*Election of 11th March 1879.*

Notwithstanding the admissions of the House of Lords, the Order of 26th February 1875 to the Lord Clerk Register has been enforced, the vote of Lord Kellie received as Earl of Mar, and Lord Mar has been compelled to abstain from voting,	265, 266
I lodged my second protest, prefacing its <i>rationes</i> by a statement of law and usage of Scotland affecting territorial Earldoms, and pointed out that the Earl of Mar was not a claimant; also that he would, by the Scottish presumption of succession, be entitled to the Earldom of 1565, if it ever existed. On Mr. Maidment's advice, I abstained from protesting regarding the nullity of the Act 1847. General <i>rationes</i> of protest cited,	266-268
Lord Stair adhered to my protest—protests of Marquess of Huntly, Earl of Galloway, Earl of Mansfield, Lord Arbuthnott, and Lord Strathallan. Protests received, and question if they are to be recorded,	268, 269
Lord Elphinstone, after attacking a paper supposed to be mine, criticised the <i>rationes</i> of my protest, as did Lord Saltoun, who made a counter-protest, adhered to by Lord Balfour of Burleigh. Remarks by Lord Galloway,	269-274

#### SECTION II.—*Debate in House of Lords, 11th July 1879.*

Lord Huntly inquired whether the protests at last election had been reported to House, and proposed enforcing the Act of 1847 as regards Lord Kellie, whose vote had been protested against, by ordering him to establish his claim—an attempt to turn the weapon of the Select Committee against Lord Mar's opponent,
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stating further that Lord Kellie's vote had been received in respect of a peerage under attain, . . . 275-278

Lord Cairns, declining to discuss a question decided by the House, directed himself to the two questions :—1. Was the Lord Clerk Register justified in receiving the vote of the Earl of Kellie as Earl of Mar? which he said depended on the meaning of the Resolution and Order of 26th February. There is one entry of Earl of Mar in the Roll of Peers, whether rightly or wrongly placed, and the Lord Clerk Register must call it where he finds it. 2. Ought the Protests to have been returned to the House under the Act of 1847? The provisions of that Act cannot apply to a Peer who has already established his title, . . . 278-281

Lord Blantyre characterised the decision of 1875 as contrary to common sense, . . . 281, 282

Lord Redesdale called it presumption in a Peer to contest the decision of the House on a point which no other body but the House can decide. At the Union the Peers of Scotland obtained the privileges of the Peers of England, and there is no privilege that the latter hold more dear than that the House is the sole judge whether they are entitled to their honours. (The Peers of England have no such privilege, and the right to a peerage is here confounded with the privileges of the peerage.) None but those who have investigated the evidence can pronounce an opinion on it. (True: but is the evidence to be read by the law of Scotland, or by private rules of the House subversive of that law?) As to the question of precedence, he cited the Order of 1708 regarding protests, by which he said the House recognised its authority on that subject. (On the contrary, it recognised that of the Court of Session, as shown in 1769-71.) It would not invalidate the peerage, that the precedency was wrong. He quoted the Order regarding the position of the barony of Dingwall in 1711. (This was the case of a peerage not on the Union Roll because dormant. Further reference to Dingwall case.) Argued further that the date assigned in 1606 was 1457, when there was an Earl of Mar sitting in the Scottish Parliament, a younger son of James II. (But, 1. Lord Redesdale in his speech in 1875 held the precedency to be from 1404. 2. The postponement to Erroll, on which the date 1457 is founded, is of no force, as Erroll owed his precedency to his office as Constable. 3. It was impossible that the son of James II. alluded to could have sat in Parliament in 1457, as he was then an infant.) That no other Earldom than that of 1565 exists was proved by the extinction of the old Earldom for 500 years: the entry in the Decreet of Ranking was therefore erroneous (refuted in Letter VII.) Lord Redesdale concluded by contrasting the full inquiries made by the House with the inquiry of 1606, . . . 282-289

Lord Galloway, after vindicating the ranking of the Commissioners, referred to the incompetency of the House to decide this question, and the reservation at the Union of the privileges of the Court of Session and the inviolability of its decisions; and also to the irregularity of sending off the Order to the Lord Clerk Register before the Resolution had been submitted to the Sovereign. In 1626 the Court of Session declared that the ancient Earldom still existed, that the heirs had been temporarily deprived by usurpation in 1457, and that their wrongs were redressed by Queen Mary in a charter which, by the law of Scotland, conveyed the honours as well as the lands. He further contended that Lord Mar was not bound to claim a right of which he is in legal possession, and concluded by calling the attention of the House to the absence of all mention of the ancient Earldom in the Resolution of 1875; and to the force of the word "restituere" in the charter of 1565,	289-294
Lord Selborne then gave utterance to opinions fatal to the peerage, if not nation of Scotland; asserting that claims to Scottish peerages are subject by Statute law to the determination of the House of Lords exclusively, whose decisions have the force of Statute law. The decision of the House is that a certain Peerage of Mar was created by Queen Mary, and belongs to the Earl of Kellie. Nothing has been decided regarding the ancient Earldom, which may be claimed through the machinery of the Act of 1847,	294-297
Remarks by Lord Stair and Lord Huntly,	297
Everything in this debate is insignificant in comparison with Lord Selborne's statement as to the conditions under which Scottish dignities come before the House of Lords; as to which I must protest that there is no statutory authority for the subordination of the right to Scottish peerages to the House of Lords; that no such subordination could have been carried out except in violation of the Treaty of Union, or can be carried out in the future except under conditions tantamount to a revolution; for the following reasons,	297, 298
1. The jurisdiction vested at the Union in the Court of Session cannot be taken away except by Statute, and that for the "manifest benefit of the people of Scotland,"	298
2. The jurisdiction in dignities having been vested by Statute in the Court of Session, claimants can only petition the Sovereign under a tacit compact. The Sovereign thus possessing no jurisdiction, cannot impart jurisdiction to the House of Lords,	299
3. No Statute has deprived the Court of Session of this jurisdiction, or bestowed it on the House of Lords,	299
4. If Lord Selborne's affirmation is based on the Act of 1847, his error is still more grave. That Act only applies to pretenders,	

not peers actually in possession ; and the Act has been elsewhere shown to be deficient in Constitutional authority,	299, 300
5. Were the jurisdiction in the House of Lords by Statute, Lord Mar's right has not been legally affected by anything done in that House, as—1. That House having been advised in opposition to Scottish law, the Resolution and Order fall. 2. The House had no power to affirm Lord Kellie's right as against Lord Mar's, the question being <i>res judicata</i> since 1626,	297-301
Lord Selborne's qualification of the manner of proceeding not reconcilable with his words, the "usual course," that being by petition to the Sovereign, not the House of Lords,	301
The distinction between Scottish and English claims, based on the assumption that there is no statutory ascription of jurisdiction to the House of Lords in English cases, is correct, but in a different sense from Lord Selborne's. English claims are under the jurisdiction of the Sovereign, which never was delegated to the Courts of law, as Scottish claims were to the Court of Session. Fortunately Lord Selborne's views are his own, unsanctioned by the Select Committee,	301, 302

SECTION III.—*Election of 16th April 1880.*

Remarks of Lord Clerk Register on the mode in which protests and counter-protests at last election had been recorded. Protests of Marquess of Huntly, Earls of Erroll, Morton, Galloway, Stair, Viscount Arbuthnott, and Lord Blantyre, against vote of Earl of Kellie as Earl of Mar. My own Protest ; those of Earl of Carnwath, Countess of Rothes, and Lord Napier,	302-305
Lord Saltoun's counter-protest, adhered to by Lord Balfour of Burleigh. Lord Galloway objects to the mention of the House of Lords as the Supreme Court adjudicating on the case. Speech of Marquess of Lothian overlooking the fact that the Sovereign is the judge. Further remarks by Lord Galloway. Lord Elphinstone re-introducing question of alleged cancelling of presentation at Court, and denial of precedence to Earl of Mar's sisters, wrongly representing Lyon's opinion. Duke of Buccleuch objected to Lord Galloway's statement that a decision of the House of Lords was an opinion, not a judgment. The Lord Clerk Register received vote of Earl of Kellie, but also received Protests,	305-314
During the incidents related in this Letter no change has taken place in the broad features of the case ; but Lord Galloway and Lord Blantyre have been added to those struggling for the maintenance of law and the Treaty of Union. We have fifteen protesting peers, as against two counter-protesters supported by three other peers,	315, 316

## LETTER XVII.

## CHARGES AGAINST MYSELF.

	PAGE
THE second category of charges against myself reserved to the close remain to be met. They are, . . . . .	317
1. Inconsistency in argument as circumstances vary; viz.:—	318, 319
i. My alleged ancestor, in 1706, in a precedency action against him by Earl of Sutherland, is said to have argued in favour of the presumption for male descent. Were the then Earl of Crawford my ancestor, which he was not, his having founded on a plea which I denounce cannot infer inconsistency in me. The decret in that action was not a final judgment, and opened again by Sutherland in 1746. That the Lords of Session in 1706 recognised the abstract law of succession, as in the Oliphant case, is evident from the Lovat judgment of 1702, . . . . .	319, 320
ii. In theory I am said to be in favour of female succession, but to exclude females in my own Earldom. In the Earldom of Crawford females are excluded, not by presumption of law, but by the exception, as shown by the succession, . . . . .	320-322
iii. The decision in my father's favour in the Crawford claim is said by Lord Kellie to have been in opposition to the Oliphant case—this was for the same reason not so, . . . . .	322
iv. Still less is Lord Kellie justified in inferring that in the Crawford claim the House of Lords did not consider the law in the Oliphant case “infallible.” The supposition that the House considered itself at liberty to disregard a solemn and final decision of the Court of Session is the strongest possible condemnation of the House. They did not so in the Crawford case, though they did in the Cassillis and other cases, . . . . .	322, 323
v. In the Montrose case I am said to have wished to construe a remainder “ <i>hæredibus suis</i> ” as to heirs-male. Heirs is a flexible term—see Erskine—and the heirs under the investitures were heirs-male, . . . . .	323-325
vi. My protestation in favour of Lord Mar's right under the rule laid down in the Oliphant case not inconsistent with my advocacy of the recognised exception in the Crawford and Montrose cases, . . . . .	325, 326
vii. I am said to have quoted part of the Oliphant judgment for another purpose. The other interlocutors had no reference to the general law of succession, . . . . .	326
2. My intervention in behalf of Lord Mar said to proceed from an interested advocate, animated by hostility to the House of Lords, as a disappointed claimant. Cite words in my Address in this connection. I do not quarrel with the word “disap-	

pointed." Did I use these words without weighing their import? Were they true? They were prefixed to a published Report in which nothing was alleged without proof, and whose fairness and accuracy were never questioned. Lord Kellie is wrong in enumerating as the Committee for Privileges "Lords Lyndhurst, Brougham, St. Leonards, Cranworth, and Redesdale, who were unanimous." The entire hearing was comprised between the 18th July and 5th August; and judgment was pronounced eleven days after the reply for the claimant, and before the evidence had been printed. Criticism by an American supreme judge. The charitable construction would be to regard my action as animated by a sense of justice, rather than by petty pique against the agents of that injustice, . . . 326-334

## LETTER XVIII.

### WHAT REMEDY?

I HAVE now to consider the question of remedy both as regards Lord Mar and the peers and people of Scotland, with practical suggestions, . . . . . 335

#### SECTION I.—*General considerations.*

1. In respect of Lord Mar, the cancelling of the Order of 26th February 1875 would remove the obstacle to the exercise of his rights, and be the logical consequence of the views of the Select Committee. The House has admitted that it possesses no legislative power except under the Act of 1847, and no power to tamper with the Union Roll. It follows that its private rules cannot supersede the law of Scotland. But this Order, apart from its other flaw, reverses the precedence of the Roll; and the Resolution proceeds upon rules opposed to the law of Scotland. The Resolution may be allowed to wither; but the Order ought to be cancelled, . . . . . 335, 336
2. The remedy as affecting the peers and people of Scotland opens a broader field. My Protest quoted as to canases of peril. The House having since taken a further step towards absolutism, the perils are nearer; and the remedy is a reversion to the usage of referring peerage claims and disputes at elections at Holyrood to the Court of Session, . . . . . 336-339

#### SECTION II.—*Enumeration of perils.*

- (1.) The dominant peril, from which nearly all the rest spring, is the assumption by the House of absolute jurisdiction in dignities. It is not a novelty, and has been exercised rather than asserted,

but has been recognised neither by Crown nor courts of law. In the English House of Lords before the Union it has been successfully resisted. Soon after the Union the House welcomed petitions from the Duke of Hamilton and others aggrieved by the result of an election; and after inquiry, passed a General Resolution (applicable to the Duke of Queensberry) that a peer of Scotland who was also a peer of Great Britain had no right to vote at elections. In 1711, another General Resolution was passed (in the case of the Duke of Hamilton and Brandon) that a peer of Great Britain who is also a peer of Scotland cannot sit in Parliament as a British peer. This Resolution was disallowed in 1782 on petition by the Duke of Hamilton to the Sovereign, and on hearing the opinions of the judges. Except in certain proceedings in 1790, the House has never since assumed the same independent authority till 1875. It had however been more successful in appropriating the character of a court of appeal from the Court of Session. But both the General Resolutions referred to (regarding British peers who were also peers of Scotland), and the General Order regarding execution of sentences of the Court of Session, were acts of legislation, the former an invasion of the royal prerogative, . . . . . 339-343

(2.) The affirmation that the House of Lords may "judge" in peerage claims on ground of expediency as well as law, as laid down in Sutherland and Cassillis cases. It affects claimants in two points, . . . . . 343

1. As to the quality and limits of the opposition which may be offered. Lord Brougham's adoption of this view in the Montrose case has been developed by the Committee into three principles—1. That it is optional for the officers of the Crown to inquire and oppose, or not, and that Committees for Privileges may protect the Crown from the expense and trouble of opposition. 2. That if the officers of the Crown decline to inquire and oppose, an absolute stranger, recognised to have no interest, may interpose to supply the Crown with evidence and argument towards the defeat of a claim, to lodge cases for the officers of the Crown to argue upon, without the latter being responsible; the counsel for such stranger may sit with the officers of the Crown, and act for them in their absence. 3. That when a claim is advised which depends on the nullity of an older title of the same name, alleged to be extinct, the peer in possession of the old title may or must be refused his title and compelled to defend himself as a commoner, and to abstain from voting at Holyrood till the claim is determined on—as in the Mar case. If under the Act of 1847, the Duke of Hamilton, *e.g.* were brought up to prove his title, the House must refuse to recognise him as

- Duke till the allegation of the two protesting peers is decided on, . . . . . 345, 346
2. As regards the immunity of peerage claims from prescription, it has been laid down that in the view of the expense and trouble of peerage claims, they should be discouraged by a bar of prescription. This suggestion, made in the Cassillis case, and revived in the Montrose case, would strike at the authority and judgments of the Court of Session before and even since the Union ; the private rights of Scottish subjects ; the royal prerogative ; public policy ; and the very roots of the Scottish Peerage, . . . . . 346-348
- (3.) The reversal by House of Lords of accepted rules regarding dignities, and establishing new rules, to be brought forth as weapons when the old are pleaded. Such are the rules of Lord Mansfield and Lord Camden, against which these Letters have been a protest. A further series of innovations, as initiated in the Montrose claim, given, with the corrective truths from Address to Her Majesty in Report of Montrose claim, . . . . . 348-353
- (4.) The power exercised by the House to supersede final judgments of the Court of Session before the Union—*e.g.* disallowance of Oliphant judgment of 1633 ; of Eglinton judgment of 1648 ; of Mar and Elphinstone judgment of 1626 ; a peril affecting other interests besides peerage. Words of Earl of Glencairn in 1649, . . . . . 353-355
- (5.) The principle (a recent one) that a Committee for Privileges is not bound by the views on which a previous Committee has founded its Report illustrated in cases of the Dukedom of Norfolk (1425) ; Earldom of Devon (1830-1) ; Dukedom of Montrose (1853) ; Earldom of Wiltes (1862) ; and Earldom of Mar (1875). Its effect is twofold : claimants are delivered from crude opinions in former Committees being enforced as precedents ; and, on the other hand, they are deprived of all landmarks for guidance. The result is utter uncertainty, with a chance of relapsing into sounder views. The Wiltes decision shows a break of continuity in the traditions of the House as advisers of the Sovereign. My experience of Committees has led me to discourage claimants who have consulted me, . . . . . 356-363
- (6.) A Committee for Privileges may report against an apprehended claim before it has been advanced, in order to preclude its being advanced. The competency of this proceeding was negatived by the Court of King's Bench in 1694 ; but it was revived in the Montrose and Mar cases, . . . . . 364-366
- (7.) The general disregard by the House of Lords of the provision for the rights of Scottish subjects in the Treaty of Union. The Act of 1847 is a flagrant instance. Other interests are affected as well as peerages. Noble Lords at Holyrood have boasted that they were British peers, entitled to have their rights adjudicated

on by the House of Lords exclusively, confounding the privileges of a peer with the right to a peerage, . . . . .	366, 367
(8.) After the injury already inflicted on the heirs to the dignities of Glencairn, Montrose, Mar, in the past, what may be expected in the future ? . . . . .	367-369

SECTION III.—*Disadvantages of the present usage.*

Interference of the Legislature would make matters worse ; and resort to the Court of Session is the proper remedy. Where interests are at stake dependent on the laws of a country, and the Court is the supreme tribunal of that country, presided over by men conversant with the law and precedents, justice must be better administered than by the tribunal of a foreign country, presided over by men trained in a different school, . . . . .	369, 370
The House of Lords, as a Court of Appeal, decides, after full consideration of the judgments of the Court of Session ; but in the investigation of claims to dignities under reference from the Crown, they only become acquainted with the case through the pleadings of counsel, . . . . .	371
The objection to a foreign tribunal is stronger since the House has asserted an absolute jurisdiction, cut off all opportunity of remonstrance, and precluded the Sovereign from announcing his award. The contrast is between the Court of Session, with the ablest Scottish lawyers as judges, and Committees in which three, two, or one noble Lord has decided claims to peerage, . . . . .	371
While the Sovereign took advice where it could best be had, as George I., from the law officers of the Crown for Scotland, in the Kirkcudbright case, the system was less objectionable, but the Order of 26th February 1875, the assumption of absolute jurisdiction by the House of Lords, and the speech of Lord Selborne, have signed its death-warrant, . . . . .	371, 372
Practical details of procedure before House of Lords in case of a claim to a Scottish dignity. The lay peers are dummies, and the Committee guided by the law Lords, an exception being allowed in case of Lord Redesdale. The case is drawn by Scottish counsel ; but with two exceptions they are not allowed to plead. The English counsel who plead in peerage claims are overburdened with work, and require the case to be mastered by counsel of less distinction, who “insense” them with the argument. The English counsel sometimes object to the expositions of law, alter passages in the Cases, or take their own line, as more effective with the law Lords, with the best intention, but at risk of running on sunken rocks. Temptation to subordinate Scottish to English views. Three transitional steps between claimant or Scottish counsel and Sovereign—the English sub-counsel, the English counsel, and the English law	

Lords. Difficulty in getting English counsel to take in the principles of Scottish law or the system in which dignities are rooted, . . . . .	372-375
The law Lords are English lawyers untrained in the feudal law of Scotland, which is expounded to them by English counsel predisposed to hold decisions of the Court of Session cheap, and to forget that they are only a consultative body. They cannot descend to fundamental principle. The counsel being staggered by an unexpected question, a fallacy which he feels impotent to deal with, from ignorance of Scotch law, they have to feel their way. Difficulty from cases drawn up by adherents of orthodox and heterodox schools, . . . . .	375, 376
Hence the advisers of Committees form rules of their own, assuming that there was nothing settled in the law of Scotland before the Union, a belief which would have been dispelled by perusal of the standard institutional writers of Scotland, or consultation of the Scottish judges. The Committees exhibit the spectacle of bodies shifty, nebulous, and erratic, bound by no precedent, claiming a large discretion, so that there can be no confidence in their consistency. Moreover, the House has excluded the Sovereign from the claimant's view, and proclaimed itself a Star-Chamber, but without the Sovereign, . . . . .	377, 378
Scottish claimants are therefore deprived of the protection to which they are entitled, not only by the Treaty of Union, but on the principles of universal justice. In the Mar case, two learned Lords and the Chairman of Committees have attempted to undo what the Queen of Scotland with co-operation of her Council and the Supreme Court, and universal acquiescence till now, carried through in vindication of justice; and to the effect that, if the Report be acquiesced in, Scotland will be deprived of her oldest surviving dignity, . . . . .	378, 379

#### SECTION IV.—*Proper remedy.—To resort to the Court of Session.*

A resumption recommended of the usage discontinued since 1730 and 1746, a discontinuance imputable to the action of claimants, not to any <i>laches</i> on the part of the Court of Session. Shown in former Letter to be a competent tribunal: and affirmed to be so by Lord Mansfield. There is no precedent for an appeal in such cases; and even could such take place, the claimant's position would be far more tolerable than at present, . . . . .	378-380
It was admitted by Lord St. Leonards in 1853 that the Treaty of Union gave no sanction of the deprivation of the Court of Session of the right to judge in peerages, if they possessed it before, which he doubted. His bewilderment and question how the House got any jurisdiction in peerage claims answered in my Address to Her Majesty. It requires a specially trained	

tribunal to judge where the laws of Scotland and England are at variance; and the moral justification of the licence accorded to counsel in their presentments of law is the presumption of the competency of the judges to expose fallacies, qualifications which foreign judges cannot possess, . . . . .	380-383
Recourse to the Court of Session is the more appropriate that it is by misapprehension that claims have been submitted to the Sovereign. The Kings of Scotland divested themselves of this right, and the right to resort to the Court of Session and correlative obligation is protected by the Treaty of Union, . . . . .	383, 384
The Court of Session is also the proper tribunal in questions arising on claims to vote at Holyrood. Questions of right to peerage were decided by the Court before the Union, and no power was taken from it at that time. The Protests transferred to the books of the House of Lords in 1708 were for remedy at the hands of the Session, and their validity as such was recognised as late as 1771. The Lord Clerk Register has been subjected by no Act of Parliament to the dictation of the House of Lords, and is bound to act in accordance with the higher obligation of the laws of his country, . . . . .	384, 385
The powers of the Act of 1847, more limited than supposed by the Select Committee of 1877, must fall with that Act, which assumes that neither Crown nor Court of Session has any concern in its subject-matter, . . . . .	385
Concluding address to Lord Glasgow, . . . . .	385, 386

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THE EARLDOM OF MAR.



# THE EARLDOM OF MAR.

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## LETTER VII.

### DECREET OF RANKING AND UNION ROLL.

I HAVE stated as matter of fact and history, in its due chronological place in the preceding Letter, that, in the Decreet of Ranking of the Scottish nobility pronounced by the Royal Commissioners in 1606, the Commissioners assigned a precedence to John Earl of Mar much higher than would be correct, could it be established that the existing Earldom was a new creation by a lost patent in 1565. No less than seven Earls created previously to 1565, namely, Rothes, Morton, Menteith, Eglinton, Montrose, Cassillis, and Caithness, are postponed to Mar by that Decreet. The fact is admitted on all sides, and equally so that the same relative ranking is perpetuated in what is called the Union Roll, or roll of the Scottish peerage called at all elections of Scottish Representative Peers since 1707. These facts furnish a strong argument against the presumption of a new creation in 1565, and can only be accounted for by the admission that the Earldom restored in 1565 was the ancient dignity: whence it follows *ex necessitate* that the heir-general, not the heir-male, is entitled to vote as Earl of Mar at the election of Scottish Representative Peers at Holyrood. Hence the efforts of Lord Mar's opponents have been directed to the depreciation alike of the Union Roll and of the Decreet of Ranking, which is its basis. I was unwilling to interrupt the course of my narrative of the recovery of the estates of the Earldom by dealing with the questions that

have arisen upon the Decreet of Ranking and Union Roll, and which might be more conveniently dealt with in a separate Letter. The present appears to me the most fitting place for the discussion. I am especially bound to do it justice, inasmuch as Lord Kellie, declining to be drawn into controversy on any other points in my recent protests at Holyrood—assuming them to be condemned already by the simple force of the Resolution and the speeches in the Committee for Privileges in 1875—has challenged me categorically on the subject of the Decreet of 1606 and the Union Roll, and of the evidence afforded by the Decreet of Ranking in particular to the antiquity of the existing Earldom of Mar. I am ready to meet him on this point, and with this view I shall invert the order I have hitherto observed; and instead of stating the facts as supported by evidence in the first instance, and dealing with the objections afterwards, I shall in this Letter state the objections first, in deference to Lord Kellie's challenge, and conclude by refuting them by vindication of what I maintain to be the truth. I cannot, however, dissociate Lord Kellie's animadversions from those which Lord Chelmsford and Lord Redesdale passed upon the Decreet of Ranking in 1875, not merely because everything which falls from these distinguished men requires my most respectful consideration, but because Lord Kellie's letter proceeds throughout, except in one particular, on their speeches as its basis. I am also bound to take notice of some criticisms by Lord Redesdale in a letter to the *Times* of 6th July 1877, commenting on earlier observations of mine in a paper on the subject of the Duke of Buccleuch's proposed Resolution of the 2d of that month; and I am under a still stronger obligation to give full response to a letter with which he honoured myself on the 19th May 1879, developing, enforcing, but partly in correction of, what he had uttered in 1875. I requested his permission to decline replying to this letter till I could do so satisfactorily in connection with my reply to the challenge of Lord Kellie. The criticisms of Lord Chelmsford and Lord Redesdale refer exclusively to the Mar precedence in the Union Roll; but Lord Kellie's observations point, if I mistake not, to the expediency of future action with the view of bringing the Union Roll into conformity with the Resolution arrived at by the House of Lords in 1875, the

Resolution and the Roll being at present undeniably discrepant. I shall reserve comment on this ulterior point to a later stage in the development of the Mar drama.

I shall place before the reader at the threshold the passages in my two Protests to which Lord Kellie's challenge points—passages in which I have founded upon the Decreet of Ranking and the Union Roll as affording indisputable proof, subsidiary to that afforded by the decreet in the Mar and Elphinstone process in 1626, that the existing Earldom of Mar is not a new creation in 1565 by a lost charter of what Lord Redesdale habitually speaks of as a “peerage-earldom,” but the ancient feudal Earldom, restored in 1565 *per modum justitiæ* by the existing charter of the Comitatus to John Lord Erskine “et hæredibus suis,” and descendible under this charter to heirs-general, held in that right by Earl John in 1606 when he was ranked with a precedency from 1404, and now vested by the same right, as well as through the *jus sanguinis*, in the present heir-general, the direct and lineal descendant of Robert Earl of Mar in 1438. The references to the Decreet of Ranking and the Union Roll in these Protests proceed, as in all such remonstrances for remeid of justice, on the assumption that the true character and import of these documents are understood and appreciated by those to whom the Protests are addressed. It is not in a protest that principles and facts demand exposition and probation. The place for probation is either before or subsequently to such remonstrance, when the justice of the appeal has been questioned, as in the present case, both by Lord Kellie and by Lord Redesdale.

#### SECTION I.

##### *Objections stated.*

The passages in my Protests objected to by Lord Kellie are as follows:—

The second article in my first Protest—against the acceptance of the vote of the Earl of Kellie as Earl of Mar at the election of 1875, in prejudice of the legal right of the heir-general—proceeds on the following grounds:—

“Because the Resolution of the Committee of Privileges, proceeding on the assumed invalidity *ut supra* of charters and documents which the

Court of Session has pronounced legal and valid," *i.e.* by the judgment of 1626, "has disregarded the evidence of the Decreet of Ranking, issued by the Royal Commissioners in 1606, which assigns precedency to the Earldom of Mar from 1404, in virtue of the charters and documents in question, in full recognition and affirmation of the continuous descent of the Earldom from that year, and in the succession of heirs-general established thereby—thus leaving (as before) no opening for the theory of a new creation in 1565. The Resolution of the Committee of Privileges, and the award in the Decreet of Ranking in 1606, are thus, once more, in absolute contradiction. But, inasmuch as the awards of the Royal Commissioners in 1606 are pronounced unalterable till reduced by legal process before the Court of Session; and these awards, and the judgments of the Court of Session in rectification of these awards, were observed and enforced by Parliament, as in duty bound; and the precedency of Mar grounded *ut supra* has never been reduced, and stands on the Union Roll—which roll derives its warrant exclusively, not from Parliament, but from the Decreet of Ranking, of which, corrected by the judgments of the Court of Session, it is a transcript; and, thus sanctioned, cannot legally be ignored or dealt with by any incompetent hand: And further, inasmuch as all subsequent courts of law and commissions of inquiry are bound to decide or report in conformity with the Decreet of Ranking and the Union Roll, and Lord Mansfield gave due weight to the Decreet in his address to the Committee of Privileges upon the Sutherland claim, which was a parallel case, in 1771; and finally, the Committee of Privileges has not reported in such conformity in 1875—it follows necessarily that the Resolution of the Committee cannot weigh against the ruling of the Decreet of Ranking and of the Union Roll as above set forth, and that the Earl of Kellie has no right to vote under that Resolution as Earl of Mar."

The fifth article of my said first Protest proceeds thus in application of what is premised:—

"Because, inasmuch as the Earldom of Mar existing in 1606 and 1707, forfeited in 1715 and restored in 1824, is by the supreme authority of the Court of Session and by the Decreet of Ranking (the basis and warrant of the Union Roll), the identical Earldom which existed in 1404; and the suggestion of an Earldom of Mar created in 1565, probably by charter, and presumably with a limitation to heirs-male, is thus inadmissible,—it follows as a necessary consequence that no such alleged Earldom of Mar, created in 1565, is now, can be now, or may at any future time be placed upon the Union Roll, or can be constructively included within its category."

In my Second or Additional Protest lodged at the election of 1876, I stated the historical circumstances under which the

Decreet of Ranking was pronounced, and the proviso for reference to the Court of Session in cases where parties felt themselves aggrieved, as also the evidence upon which the precedency was assigned to Mar,—that precedency being immediately after the Earl of Sutherland and before the Earl of Rothes,—the Commissioners thus assigning to him the date of the charter 9th December 1404, as confirmed by Robert III. “as his proper place of precedency, and in this place the Earls of Mar sat until the Union.” The operation of the reference in the Decreet of Ranking was illustrated in 1626, when the Countess of Buchan (in her own right) having been placed lower down than she ought to have been, brought an action of reduction (with consent of her husband) before the Court of Session, and having produced satisfactory evidence, a decreet in her favour by the Court put her in her proper place, in correction of the Decreet of Ranking. But no challenge was ever made by any peer of earlier creation than 1565—and on the theory of Lord Kellie there were six such peers unjustly postponed—to the precedence assigned to Mar from 1404. And in the Sutherland case, Lord Mansfield laid great and just stress on the similar non-challenge on the part of ten Earls postponed to Sutherland, as proof that there could have been no new creation by a lost patent between 1514 and 1517,—the same contention which has been raised as to a new Mar creation by a lost patent in 1565. Nothing is said in the Decreet of Ranking as to a second Earldom of Mar, created in 1565. If there had been such second creation, it must have been brought before the Commissioners. A catalogue has been preserved of every document which was adduced or referred to on the occasion. James VI.’s attachment to the Erskines would have induced his attention to such a point. The Decreet of Ranking was issued only forty-one years after the restoration by Queen Mary, and many were living who must have known what then took place. Upon these facts I grounded the following *rationes* of remonstrance in the Second or Additional Protest:—

“‘IV. King James the Sixth having appointed Commissioners to settle the precedency of the peers, subject to correction upon challenge and proof by the Court of Session, the court of final appeal in all such cases, and the Commissioners having issued the Decreet of Ranking in March 1606, and the Court having corrected it from time to time in

the cases of Buchan, Glencairn, and others, as shown in the Rolls of Parliament and in the last Roll, styled the Union Roll; and having passed its solemn and final judgment upon the charters 12th August and 9th December 1404,—the ranking of the Earldom of Mar in the Decreet of Ranking from 1404, thus sanctioned, cannot, under the attendant circumstances, be now challenged in any court of the United Kingdom.’ And ‘VI. There being no Peerage of Mar on the Union Roll other than that which is referred to the ancient territorial Earls, and was afterwards in possession of John, subsequently attainted for high treason, and no claim for any new Earldom having been advanced in the Ranking and Decreet pronounced in March 1606, it follows as a necessary consequence that no new creation was made, and that the assertion that there was such is unfounded. The allegation to that effect maintained by the Earl of Kellie is therefore not grounded on fact, and must be rejected.’ Lastly, ‘VIII. There not having been, moreover, any authority to assign a place in the Union Roll to the Earl of Kellie by the Committee, the Lord Clerk Register cannot, in the discharge of his ministerial duty, give him one.’ ”

The objections to these words, as gathered from Lord Kellie’s Letter, from the speeches of Lord Chelmsford and Lord Redesdale to the Committee of Privileges, and from Lord Redesdale’s Letters, may be classified under the two heads of General Objections affecting the accuracy and trustworthiness of the Decreet of Ranking as a public document, and Special Objections affecting the accuracy of the ranking of the Earldom of Mar in particular, and the relevancy of my argument in favour of the heir-general based upon the assumption of such accuracy. They are as follows:—

I. *General.* The Decreet of Ranking of 1606 is discredited, with all that has followed upon it, including the Union Roll, on general grounds—

- (1.) Because it proceeded on mere superficial inquiry.
- (2.) Because the Commissioners who pronounced it had no means of knowing in any case whether evidence was withheld from them which would affect the order of precedence founded upon the proofs before them.
- (3.) Because the precedencies awarded have been found to be erroneous in many instances, and notably in the cases of Buchan and Glencairn.

It follows therefore that the Decreet is open, generally, to revision, disallowance, and suspension by—as is assumed—the House of Lords; and the Rolls of the Scottish Parliament, and the Roll commonly styled the Union Roll in particular, are

equally untrustworthy, in so far as they are grounded upon the Decreet of Ranking.

II. *Special.* The Decreet of Ranking and all that has followed upon it is discredited specially in the case of Mar—

(1.) Because the Commissioners acted and the Decreet proceeded in ignorance of the true facts of the case affecting the Mar precedence, in consequence of Earl John having adduced evidence which, as exclusively relating to the territorial earldom or fief, did not bear upon the question of the dignity and its precedence, and of his having withheld the knowledge of historical facts, and fraudulently suppressed and subsequently destroyed documents, which facts and documents, if known to the Commissioners, would have induced them to award the precedence solely from 1565, on the same grounds upon which the House of Lords have reported in favour of Lord Kellie. The result was that the Commissioners were induced by the fraudulent action in question, and in ignorance *ut supra* of the truth, to assign an erroneous precedence to Mar, higher by a century than 1565, the date of the creation of the “peerage-earldom” by Queen Mary.

(2.) Because—in refutation of the idea entertained by Lord Mar’s friends and by myself, that the existing charter of 1565 restored the ancient territorial earldom, fief and dignity, as held under the charter 9th December 1404 and its confirmation, and that the Commissioners who accepted that charter as evidence recognised the precedence accordingly from 1404—it appears that the Commissioners took especial pains to point out, in granting the precedence, that they did not do so on the ground of the earldom existing in 1606 being the ancient earldom. This was made equally clear under either of the alternatives, that the precedence granted was from 1404 or from 1457,—

1. Viewing the precedence as from 1404, according to Lord Redesdale’s view in 1875, they granted it as “a fancy title,” refusing to recognise any right to the Earldom as in the Countess Isabel; or,
2. Viewing the precedence as from 1457, according to Lord Kellie, and to Lord Redesdale’s revised opinion

in 1879, they fixed upon that date, posterior to the ranking of Erroll and Marischal, by deliberate choice, because an Earl of Mar of later creation, not of the house of Erskine, and from whom Earl John could make no claim by descent, was living in that year; and by giving Earl John precedence from that year they made it clear that the dignity held by him was not the ancient Earldom of Mar, which had been extinct in fact (as held by Lord Redesdale in 1875) since 1377 through failure of male heirs, but a new and personal creation.

According both to Lord Kellie and Lord Redesdale in particular, I am thus decidedly wrong in dating the precedence actually awarded as from 1404. Why the precedence was not awarded from 1565, the date when the dignity reappears in the public records, is not accounted for, except by the suggestion by Lord Kellie, already noticed, that Queen Mary may have granted a special precedence above 1565. Lord Redesdale leaves the difficulty without solution.

- (3.) Because the error of the Commissioners in ranking the Earldom of Mar so much earlier than it was entitled to did not escape contemporary notice and remonstrance; inasmuch as six Earls, Menteith, Morton, Montrose, Eglinton, Glencairn, and Cassillis, created previously to 1565, and who were prejudiced by the high precedence granted to Mar, "not only protested," as Lord Kellie states it, "but instituted proceedings for reduction of that precedence," before the Court of Session, in 1622. Earl John subsequently, in 1628, obtained various retours to the ancient Earls of Mar, Isabel's predecessors, in order to fortify his claim.

It follows that the Decreet of Ranking was open to disallowance on the part of the House of Lords in 1875 on this special point of the Mar precedence, inasmuch as all the documents and historical evidence which were (as asserted) withheld from the Commissioners in 1606, were before the Committee of Privileges in 1875; and this evidence proves beyond dispute that the dignity of Earl of Mar was a new creation in 1565, by a lost charter or patent, of a personal dignity, in terms of the Resolution. It follows as a necessary

consequence that if the Decreet of Ranking is thus peccant in the case of Mar, the Union Roll, which is fundamentally the same document, must share in the discredit, general as well as special; and this impression appears to me not obscurely indicated in Lord Kellie's recent Letter. I may add, in fine, that it is assumed that the cases of Sutherland and Mar, as determined by the House of Lords in 1771 and 1875, are parallel as respects the Decreet of Ranking and otherwise, and disprove any claim on the part of the Mar heirs-general.

I shall go through these objections *seriatim*, quoting the animadversions of Lord Mar's opponents under the respective heads, and referring the reader to the consecutive text of Lord Kellie's Letter as given in the first or introductory Letter of the present series. Lord Redesdale's letters may also be seen *in extenso* in the Appendix. I had at first intended to place the whole of them in sequence before the reader, as well as the passages in the speeches in Committee which bear upon the subject; but consideration of space and the expediency of concentration have induced me to adopt the arrangement just indicated.

My broad answer to these objections is that, second to the decret of 1626, the Decreet of Ranking in 1606 affords direct and irrefragable evidence of the fact that the existing dignity of Earl of Mar was a restoration *per modum justitiæ*, and not a new creation in 1565, inasmuch as it enjoys a precedency in the Decreet of Ranking and in the Union Roll incompatible with the latter alternative, and only to be accounted for by the former.

## SECTION II.

### *Historical view of Decreet and of Union Roll.*

The discredit sought to be attached to the Decreet of Ranking alike in a general and special point of view, and to the Union Roll, which is its heir and representative, will be found, I think, to disappear on subjecting the document to close scrutiny. I shall therefore, with the reader's permission, and as a necessary preliminary, narrate the circumstances under which the Decreet was pronounced, and exhibit its character and sanction, and its relation to the Union Roll of 1707, which is so inseparably connected with it—all in due

historical sequence, precisely as if I had paused to dilate upon the subject in the preceding Letter, instead of merely alluding to it in the course of my chronological narrative of the events affecting the dignified fief of Mar between the year 1587 and 1635. We shall thus be prepared to deal effectively with the particular criticisms tabled in the preceding analysis. I have nothing to object to in the historical details given by my noble antagonist, or by Lord Chelmsford and Lord Redesdale in their speeches to the Committee, except that they fall short of the fulness and precision which the exigencies of the present criticism require.

Fierce contentions having arisen between many of the Scottish peers as to their precedency, and an Order of Parliament in 1587, intended to allay them, having remained a dead letter, King James VI. intervened by issuing a Royal Commission under the Privy Seal for examining into and settling the disputed questions. The Privy Seal Register for the time has been lost, but we know this fact from the recital in the Decreet of Ranking.

The Commissioners were selected, as the Decreet informs us, as being the "most indifferent, and no wayes suspect of partialitie;" and their names have been recently discovered in a contemporary notice in a MS. volume, containing the correspondence of the English and Scottish Commissions appointed to organise the deportation or transportation of the Grahams and other disorderly subjects living in the "debatable land" to Flushing and Brill, after the accession of James VI. to the crown of England, a correspondence which was in active prosecution in 1606. The MS. is preserved in my muniment-room, having descended to me as heir of line and representative of one of the English Commissioners for that service, my mother's ancestor. The handwriting is that of one of the clerks, evidently a Scotchman, who transcribed part of the correspondence. The list is headed by the words, "The names of the Commissioners for Ranking the Nobilitie, 1606;" and the names of the Commissioners are followed by "the names of the nobility rankit by Decreet, 1606." The Commissioners, according to this testimony, were as follows; and I add a word or two, illustrating their official standing where necessary:—

- “John Erle of Montrose,”—appointed Lord High Chancellor 15th January 1599, and held the office till succeeded by Alexander Seton, Lord Fyvie, afterwards Earl of Dunfermline, in 1604; when he was appointed “supremus regni Scotiæ procurator,” or viceroy of Scotland, 1st December 1604.
- “Alexander Erle of Dunferling,” or Dunfermline,—a Lord of Session in 1587, as “Lord Urquhart;” President of the Court of Session, 28th May 1593; appointed Lord Chancellor in 1604, and held the office till his death in 1622: created Lord Fyvie, 4th March 1597-8, and Earl of Dunfermline, 4th March 1605-6.
- “Francis Erle of Erroll,”—Lord High Constable, on the Commission *ex officio*.
- “George Erle Marshall,”—Marshal, or, Scotticè, Marischal, on the Commission *ex officio*.
- “John Archbishopp of Glasco.”
- “Alexander Lord Elflington,” or Elphinstone, the same who was defender against Lord Mar in the great process decided in 1626.
- “James Lord of Abercorn,” afterwards the first Earl of that designation, so created 10th July 1606.
- “David Lord Skvyne,” *i.e.* Scone, afterwards Viscount of Stormont, and ancestor of Lord Mansfield.
- “Sir Thomas Hamilton of Monkland,” a Lord of Session, 9th November 1592; afterwards Lord President, and the first Earl of Haddington (having taken that title in lieu of Melrose),—a very learned lawyer and antiquary, remembered, as I have already mentioned, as “Tam o’ the Cowgate.”
- “Sir John Cokburne of Ormestone,” Lord of Session, 15th February 1593.
- “Sir Richard Cokburne of Clarkington,” Secretary of State in 1591, and Lord of Session, 11th November 1594.
- “Sir John Preston of Fentonbarnes,” Lord of Session, 12th March 1595, and Lord President of the Court, 6th June 1609.
- “Sir John Skeyne (Skene) of Curryhill,” the celebrated editor of the Acts of Parliament, Regiam Majestatem, etc.,—born about 1549, Lord of Session 30th November

1594, Clerk Register, *i.e.* Keeper of the Public Records, the same year.

“Sir David Lindsay of the Month,” *i.e.* of the Mount, the Lord Lyon King of Arms, nephew of the poet, and Commissioner *ex officio* :—the list ending with

“James Prymroise,” or Primrose, “clerk,”—the Lord Clerk Register, and Secretary of the Privy Council.

The Commission thus included the late and the then Lord Chancellor, the Lord High Constable, and Earl Marischal, five Lords of Session, the Keeper of the Public Records, the Lyon King of Arms, an officer of especial importance as the guardian of the rights of honour and precedence,—and no unimportant personage with reference to the special question of the precedence of the Earldom of Mar—Alexander Lord Elphinstone, whose interest was most strongly engaged against any recognition of precedence in John Earl of Mar which could be held to fortify his right to Kildrummie. It would have been difficult to have named a body of commissioners more competent and indifferent, *i.e.* impartial.

The original commission under the Great Seal has not been preserved, but its tenor and the powers of the Commissioners are thus stated in the preamble to the Decreet of Ranking itself. They were commissioned to convene and call before them the whole noblemen of the kingdom, and, according to their productions and verification of their antiquities, to set down every man's rank and place. The Commissioners accordingly summoned the peers by name to appear before them, and bring and produce “such wryts and evidents, documents and testimonies as they have or can use for acclaming of that rank and place of precedencie and prioritie challengit be them before uthers,” to “be seen and considerit be the saids Lords Commissioners, and to hear and see ‘their ranks and places of prioritie and precedencie appointit and sett down to thame according to the antiquitie of thair productionis, and that quhilk should be verified in thair presence.’” It would thus appear, I may interpose, that the award was to proceed not only upon “antiquity” of “productions,” *i.e.* of documentary proof, but upon “testimony” upon “that quhilk should be verified in their” (the Commissioners’) “presence;” or upon references “verified” of their “antiquities,” a phrase including other and

all relevant evidence; while a distinction is pointed at between claims to "precedency" and to "priority," as if "priority" depended on a different rule and proof from "precedency," precedence being awarded according to antiquity of evidence in all cases, except where priority of place was proved through the tenure of heritable office or special privilege. This remark about the technical use of the word priority will be found to be borne out by what followed. The ranking thus to be assigned was to stand in full force and effect in each instance, "ay and quhill" (*i.e.* continually until) "ane decreet before the ordinary judge be recoverit and obtained in the contrair." The Decreet of 1606 was thus in no case to be final in the first instance, but open to reduction before the Court of Session by aggrieved parties. Most of the peers attended, either personally or by their procurators, the leading lawyers of the time; and the result was, that after the evidence produced had been "at diverse dyets verie diligentlie and exactlie sichtit, tryed, examinat, and considerit be the saids Lords Commissioners, and the saids Lords being thairwith, as also with the ranks and places of such erles and lords as were promoved and created in his Majesteis own time, weill and throughlie advised," the Commissioners issued their Decreet, dated the 5th March 1606, fixing the order and precedence by enumeration of the entire body of peers according to the rank, either through priority or precedence, awarded to each of them. After this enumeration the salvo or proviso briefly noticed (as above) in the preamble of the Decreet is more fully repeated as follows—and this is most important as indicating the ultimate sanction of the rankings awarded in the Decreet:—"But (without) prejudice always to such person or persons" (*i.e.* not only peers, but persons in expectancy, or claimants of peerages), "as shall find themselves interest and prejudged be the present ranking, to have recourse to the ordinar remeid of law be reduction before the Lords of Council and Session of this present decreet, for recovering of their own dew place and rank be production of mair ancient and authentick rights nor" (than) "has been used in the contrair of this process,"—the remonstrant parties "summoning thereto all such persons as they shall think wrangouslie rankit and placeit before them. And in this meantime"—another position of vital importance in the interests of

peace, and binding at the present moment—"this present decret and determination to stand in full force, strength, and effect ay and quhill" (continually until) "the party interest and prejudgit obtain lawfully a decret before the Lords of Council and Session, as said is."

The Decreet ends by an order that it shall be recorded in the Books of the Privy Council, and that "an authentic extract" (that is, an official copy) "be deliverit to the Clerk of Register," *i.e.* the Lord Clerk Register, or keeper of the public records, "and another extract . . . to the Lyoun Herauld," *i.e.* Sir David Lindsay, one of the Commissioners, "to be keepit be thame" (not personally but officially, *i.e.* in the public record office and Lyon office, and transmissibly to their successors in office) "for their better knowledge and information of every man's rank and place when the occasion of their ranking shall be presented." The Register of the Privy Seal for the year 1606 is, as I have stated, unfortunately lost, but the Decreet is fully known by an "extract" under the hand of James Primrose, Clerk of the Register, in his character of clerk to the Commissioners, and which is evidently one of the two ordered by the Decreet to be engrossed. This extract is preserved in the Advocates' Library, and was among the manuscripts of Sir James Balfour, Lord Lyon King of Arms under James I. and Charles I., including many pertaining originally to the Lyon office, which Sir James had removed to Fife for safety during the great rebellion, and which never left his custody and that of his representatives till rescued, as in so many instances, for the nation by the public spirit of the advocates of Scotland. Balfour was a subordinate herald under Sir David Lindsay of the Mount in the year 1606; and the extract is evidently that delivered to Sir David under the order of the Decreet of Ranking above spoken of.

The documentary evidence upon which the assignment of precedence proceeded is known by a schedule or inventory a copy of which forms the first part of the "*De Jure Prælationis Nobilium Scotiæ*," preserved among the manuscripts of Sir James Balfour in the Advocates' Library.

Both the extract of the Decreet and the schedule of evidence have been repeatedly adduced, received, and dealt with as evidence by the House of Lords.

It is important to take notice that the Royal Commissioners were not instructed or empowered to compel production of evidence, far less to make a search through the charter-chests of Scotland,—on the contrary, their office was limited to the reception and verification of such evidence as the peers themselves might offer; but this was supplemented (as is shown by the schedule) in cases where the peers offered no evidence, and in many cases where they did, by evidence “*ex registro*,” *i.e.* from the record of the Great Seal, evidently supplied by the Clerk Register, who was in attendance with the books of his office. It falls to be remembered, that while the Commissioners were thus at work, the Lords of Council and Session, the Supreme Court of Scotland, were the supreme judges in all cases of dignity, including precedency; and nothing done by the Commissioners in their lower sphere could derogate from the supreme jurisdiction of the Court above them. It is impossible for words to express this more clearly than those of the Decreet of Ranking. The Decreet was therefore in many respects, it cannot be too emphatically expressed, of an *interim* or provisional character, but binding nevertheless on every peer till such time as it should be reduced with respect to such peer by legal process before the Court of Session; while, after the Court had pronounced its judgment *in foro contradictorio*, although not till then, the ranking of the peer in question stood not on the authority of the Decreet, as it were negative, but on that of the Court of Session, positive. It is most important that the value of the Decreet of Ranking should neither be unduly extolled nor unduly depreciated. It was, in fine, neither in itself a final judgment nor a careless inquest, but a careful award under the conditions and limitations prescribed. An honest effort in a right direction, although upon imperfect materials, it professed to do no more than it accomplished.

The Decreet of Ranking was anxiously appealed to James I. when preparing for his visit to Scotland in 1617, and in prospect of the meeting of Parliament, when he apprehended that the dissatisfaction existing on the part of certain peers affected by the Decreet might break out into violence in his presence. An Act of the Privy Council, 12th June 1617, passed at his instance, narrates the appointment of Commissioners in 1606: “to sett doun the rankis of the haill nobilmen according to the verifica-

tioun of thair antiquities," which they settled by decreet, "after lang panes and travellis tane be thame in that mater," and proceeds thus—"His Majestie doubtis not, bot is assuirit that all his nobillis who ar to be present at this Parliament will haif a reverent and dewtifull regaird to keepe that ordour and modestie whilk becometh, and to content thame selffis with thair rankis and placeis as thay ar sett down in the said decreit: And whereas ony of thame findis thame selffis greivit be thair ranking, that thay will reserve thair greevis to ane vther tyme, and seeke the reparatioun thair of according to the ordour prescryved in the said decreit." The officers of the Crown are therefore ordered to pass to the market-cross of Edinburgh, and make proclamation accordingly.

The list or roll of peers, ranked according to their precedency and priority, laid down by the Decreet, was adopted at once as the roll of the peers in Parliament, convention, and all public meetings, and continued to be called uninterruptedly—with such alterations upon it as judgments of the Court of Session upon appeal in modification of the precedency of certain peers rendered necessary, with the omission of such dignities as became extinct, and with the addition from time to time of newly created peerages—down to the last sitting of the Scottish Parliament on the 1st May 1707.

It has to be noticed here that after the Act of 28th June 1617, introducing prescription upon heritable rights after a period of forty years, it became necessary for such peers as held themselves to be prejudiced by the precedency awarded them in the Decreet of Ranking either to prosecute those ranked above them before the Court of Session, with the view of obtaining a final decision, or to reserve their right by protestation on the calling of their titles in Parliament. These protests, when renewed at intervals sufficient to secure them from becoming barred by prescription, preserved their right of prosecution before the Court of Session, in terms of the Decreet of Ranking from generation to generation. The protests were "for remeid of law" in the ordinary course, the Parliament having no jurisdiction either in dignities or precedency; and, on the contrary, invariably, except on one occasion during the great rebellion, refusing to interfere.

The manner in which the Decreet of Ranking, corrected and

supplemented as I have explained, became the "Union Roll" was as follows:—After the accomplishment of the union of the two kingdoms, and in anticipation of the first election of Representative Peers for Scotland, the House of Lords, on the 22d December 1707, issued an order that the Lord Clerk Register for Scotland "do forthwith lay before this House an authentic list of the peerage of that part of Great Britain called Scotland, as it stood on the first day of May last," the last day of the sitting of our native Parliament. An "authentic list" was accordingly sent up; and the roll of the estate of the peers, as called on the 1st of May 1707, being, as has been shown, the roll of the Decreet of Ranking, corrected and supplemented *ut supra*, and "attested by Sir James Murray of Philiphauigh, one of the Senators of the College of Justice," *i.e.* a Lord of Session, and "Clerk to Her Majesty's Councils, Registers, and Rolls," *i.e.* Lord Clerk Register. And on the 12th February 1708, the House of Lords, after receiving this "authentic list," ordered "That the List and Order of the Peers of the North part of Great Britain called Scotland, attested by the Clerk Register, be received and entered into the Roll of Peers; with the salvo following,"—the bearing of which will be clear from what I have stated above respecting protests,—"That, whereas there are several protests entered on the records of Parliament of . . . Scotland in relation to the precedency of the Peers, the said Protests shall be and are of the same force with relation to their claims of precedency as if they had been entered in the Roll of Peers, or in the Journal of the House of Lords." The protests "for remeid of law" by reduction of the Decreet of Ranking before the Court of Session were thus handed down from the Scottish Parliament to the Parliament of the United Kingdom in its Upper Chamber, the House of Lords; and they have been in many cases kept alive and available in legal form against prescription down to the present time by reiteration at the election of Scottish Representative Peers at Holyrood.

The effect of protestations in Parliameut as legal interruption of prescription of precedency was affirmed, I may here interpone, by the Court of Session in the great process between Sutherland and Crawford in 1706.

It is hardly necessary to repeat that the right of Scottish

Peers thus to protest and to prosecute their claims to precedence either under the reference in the Decreet of Ranking or under the powers conferred upon the Court of Session by Statute, to which the proviso in the Decreet is wholly ancillary, is protected under the general sanctions of the Treaty of Union.

The Roll of the Peers of Scotland—not made up by the Lord Clerk Register or of a haphazard character, but as the roll according to which the Peers sat at the last meeting of the Scottish Parliament, and were marshalled as they rode in the final ceremony through the streets of Edinburgh among a sorrowing people—furnished as above, and officially attested by the Lord Clerk Register, and inscribed in the Roll of the House of Peers of the United Kingdom—thus in every respect a most authentic and interesting document—is what is popularly styled the Union Roll, and it has even been spoken of as an article of the Treaty of Union; but this last qualification is scarcely accurate. It stands liable to correction by the Court of Session (where the right of appeal has not been forfeited through prescription), under the guarantee of the Treaty of Union, in virtue of the provision of the Treaty protective of the private rights of Scottish subjects, peers or commoners, to this extent, that the rights of dignity and precedence on the part of peers and their heirs, and the right of the Court of Session to adjudicate upon such, are secured, beyond infringement except through usurpation or revolution, by the solemn terms of that international treaty. It is important, as in the case of the Decreet of Ranking, to take a just view, neither exaggerated on the one hand nor depreciatory on the other, of this much debated Union Roll. The Union Roll is, as I have shown, the roll recited in the Decreet of Ranking of 1606, with the corrections made thereupon by the judgments of the Court of Session, and the additions made to it in the case of peers created between 1606 and 1707, both years inclusive, inserted (perhaps) by order of the Parliament (under sanction of the Lord Lyon King) before the Union, and of the House of Lords since the Union; but subject equally since as before, in all cases of claimed or disputed rights affecting precedence, to the paramount jurisdiction of the Court of Session.

I have to add to this historical review of the Decreet of

Ranking and the Union Roll, that the validity of the protests referred to in the salvo or provision inserted in the Journal of the House of Lords on the 12th February 1708, and the authority of the Court of Session to adjudge upon processes preserved by these Protests against prescription, were fully recognised by the House of Lords as late as the epoch of the Sutherland claim in 1771. Among these protests were those of the Earls of Sutherland claiming precedence over all the Earls, and specially over the Earls of Crawford. The Court of Session had determined a tedious litigation by Sutherland against Crawford, by an interlocutor, 23d January 1706, sustaining Crawford's precedence, but not in such technical form as to establish a final decision, or preclude the question from being re-opened. The Earls of Sutherland nevertheless allowed the question to sleep till 1745, when their representative instituted what is called a process of "wakening" against Crawford, for the purpose of obtaining a full and final decision, as he hoped, in his favour. Thirty-nine years had elapsed between 1706 and 1745, and prescription would have supervened if forty years elapsed without either a renewed protest, or an actual process initiated at law. Sutherland adopted the latter alternative, and the Court, after full argument, sustained the plea by a decret of 18th November 1746, and would have carried it to a final determination, had not Sutherland, satisfied apparently with the manifestation, abstained from further action. But in 1769, when the great Sutherland case came before the House of Lords by reference from the Crown, the House, in due observance of the salvo of 1708 and of the proceedings of 1746, and, necessarily, in recognition of the right of the Court of Session to adjudicate finally upon the precedence under the reservation of the Decreet of Ranking, ordered that Crawford and Erroll (who had been a party to the ancient litigation upon which the interlocutor passed in 1706), should be summoned to be heard for their interests in opposition to the claims of the competing Sutherland heirs, Elizabeth, the heir-general, and the heirs-male, Sutherland of Forse and Sir Robert Gordon; and the two Earls appeared by counsel accordingly, and were heard at the bar of the House, although they took no further part in opposition to the respective claims on their merits. It is clear from this action taken by the House of Lords in 1769-71, that, whatever right the

House of Lords might assert to adjudge upon claims to Scottish dignities referred to them by the Crown, they still at that time respected the rights of the subject and of the Court of Session in cases of precedency under the Decreet of Ranking, as above vindicated; as they had, in a still more important matter, respected and recognised the right of the Court to judge finally in the case of claims to dignities, in the instance of Lord Lovat in 1730.

It is important, in the interests of the Scottish Peerage, and of the Earldom of Mar in particular, that the weight and sanction of the Decreet of Ranking and of the Union Roll shall neither be unduly exaggerated nor unjustly depreciated. The facts above stated are matter of evidence and history, and form necessarily the background of all discussion. It is evident, negatively, that nothing has taken place to release Scottish Peers, whose creation dates before 1606, from the obligation of acquiescence in the precedence awarded by the Decreet of Ranking till they have obtained decreets in their favour from the Court of Session, in the mode indicated by the Decreet, and prescribed by that law of the land to which the Decreet pays deference and gives expression. That, again, nothing has taken place to deprive parties aggrieved by the Decreet of their right to prosecute claims for higher precedency before the Court, or parties of creation subsequent to 1606, who conceive themselves wronged in their precedency, from prosecuting such claims in virtue of that original and constitutional jurisdiction of the Court which overshadows the whole question,—that nothing has taken place to deprive the Court of Session of the right and duty of adjudging in all the cases thus specified, and, conversely, nothing to invest the House of Lords with authority to usurp the functions of the Court of Session, supersede the awards of the Decreet of Ranking, or interfere with the Union Roll. But those negations are the mere vestibule to a positive conclusion, which is, that the Decreet of Ranking and the Union Roll, which is fundamentally the Decreet, with the corrections and additions aforesaid, stand upon sanctions antecedent to the Treaty of Union, are protected under the general terms of the Treaty, and are, as the expression and guarantee of private and heritable rights, in the case of each individual dignity, unalterable in any one point by King or Parliament, and *a fortiori*

by one only of the two Houses of Parliament, and only open to correction by the Court of Session in the proper form prescribed by the Decreet of Ranking, and by the original constitution of the Court, subject only to the bar of prescription where applicable.

I may add that I do not see how any dignity created previously to 1606, but then dormant, and subsequently recognised as existing, can be added to the Union Roll, except under authority of the Court of Session; and if so added in the first instance, the place assigned to it would be equally liable to challenge before the Court so long as prescription does not impose the bar of immobility. Insertions upon the Roll by order of the House of Lords appear to me to be irregular, deficient in legal warrant under any circumstances, and they would equally lie open to processes of reduction and declarator before the Court in which the jurisdiction in dignities and precedence is exclusively vested by Scottish law.

### SECTION III.

#### *General Objections dealt with.*

I proceed, upon the historical basis ascertained in the preceding section, to the consideration of the general objections tabled a few pages back.

(1.) I have first to meet the charge of "superficial inquiry" against the Commissioners of 1606 and the Decreet of Ranking. Lord Kellie says: "The six months"—from October 1605 to the 5th of March 1606—"which were occupied by the Commissioners was a brief period for inquiry into the history of the whole Peerages of Scotland, many of which were created at early dates. Instead of only six months being bestowed on an inquiry into the creations of all the Peerages of Scotland, more than that number of years have sometimes been required to investigate the descent of a single peerage. The mere superficial inquiry by the Commissioners in the course of a few months in the year 1606, regarding the whole Peerage of Scotland, cannot for a moment be put in competition, in so far as the Mar peerage is concerned, with the exhaustive inquiry which was made during several years for the special purpose of adjudicating upon the constitution and descent of that dignity."

This criticism proceeds upon the hypothesis that the Commissioners had larger powers, and were intrusted with more arduous duties and responsibilities than has been shown to be the case. Their duty was simply to examine and verify the evidence, documentary and otherwise, adduced and pleaded by the peers or their procurators in proof of their "precedency" in point of date of creation, and "priority" in point of privilege, and to "rank" them accordingly. Each peer and procurator fought for the interest of the dignity which he represented, intently watchful against any pretension which might infringe upon the ranking of that dignity. In cases where peers did not appear either themselves or by their legal advisers, the Commissioners had of course to determine according to such information as was readily available; and such was supplied by the presence of the Lord Lyon King and the Clerk Register, the former as a member of the Board, peculiarly conversant with the "antiquities" of the Scottish Peerage, genealogical and heraldic; the latter as the official secretary of the Commission, and the keeper of the public records, especially of the Great Seal Register, which, as shown, was repeatedly consulted. But beyond this the Commissioners had no assistance, and were not commissioned to ask for such. The object was the settlement of quarrels and disputes by a practical ranking, in the first instance, on the materials furnished by those interested; scrutiny and inquiries of a more recondite character being reserved for the Court of Session in cases where the ranking awarded should give dissatisfaction—a reservation and provision of which Lord Kellie takes no notice. The time which elapsed between the issue of the commission and that of the Decreet was amply sufficient for this simple purpose.

It is very remarkable that it was not till after the Restoration in 1660 that any process was commenced in the Court of Session for the establishment of higher precedency on the allegation of erroneous ranking upon documents produced in 1606. The two processes which preceded the Restoration, those of Buchan in 1628, and of Glencairn *contra* Eglinton and others in 1610, 1617, and 1637-48, both proceeded on the ground that neither the infant heiress of Buchan, as represented by her guardian, or the then Earl of Glencairn, had appeared in behalf of their respective interests in 1606, the

blame of inaccuracy thus attaching to themselves, and not to the Commissioners. The Decreet, as matter of fact, met with general acquiescence and respect at the time.

The result is, that Lord Kellie's charge of "mere superficial inquiry," in the derogatory sense, is disposed of as inapplicable, by the proof given that the inquiry was never intended to be anything but superficial in the first instance.

(2.) It follows, upon this ascertainment of the extent of power and scope of action of the Commissioners in 1606, that the objection grounded on the allegation that "the Commissioners had no means of knowing in any case whether evidence was withheld from them which would affect the order of precedence founded upon the proofs before them," cannot be counted to the discredit of the Decreet. The objection is Lord Chelmsford's, and his words are as follow:—"Under this Commission each nobleman, in order to establish his precedence, offered to the Commissioners such evidence of his title as he chose, their power being necessarily limited to the verification of the documents produced, and to forming their judgment upon them, and having no means of knowing whether anything was withheld from them which would affect the order of precedence founded upon the proof presented. Therefore," Lord Chelmsford inferred, "their decision can carry no weight on the investigation of a claim to a title which depends upon facts not laid before them."

Without remarking upon the inference thus suggested, that facts *were* withheld from the Commissioners in each case, including the Mar case—which will be dealt with under the head of Special Objections—my answer is to the general purport, that Lord Chelmsford's present objection to the Decreet proceeds, like Lord Kellie's preceding objection, on a misapprehension of the power and functions of the Commissioners. Had the Decreet in contemplation been a final, and not (as it really was) a provisional and interim judgment, the power of enforcing the production of evidence vested in the Court of Session might have been extended to the Commissioners, although even then appeal must have lain to the Court; but, as the Commission ran, the appeal in every questionable case was direct to the Court, and the Court not only possessed but exercised the power in question of exacting the production of

evidence when necessary. The manner in which Lord Chelmsford introduces the hypothesis of wilful fraud on the part of the peers summoned before the Commissioners, as a ground for doubt as to their competency to decide on matters submitted to their decision, cannot escape attack. The objection is general, a generalisation from a supposed detection of such fraud on the part of Lord Mar, openly asserted by Lord Redesdale and in Lord Kellie's case, although not so prominently put forward by the present Lord Kellie in his Letter as by Lord Chelmsford. Such an inference and argument would discredit any cause. No Court or Commission in Christendom can prevent the fraudulent withholding of evidence the existence of which is not known, although it can punish the suppression if the crime be discovered. I may observe, however, in anticipation of the fuller development of the suspicion above suggested, that it is not easily understood in England how completely the peers and great barons of Scotland, few comparatively in number, lived practically in glass houses—every action, even when of questionable character, attended by legal testimony; every concession, for example, to the hand of violence, attended by its protest, public or private, in the hands of a notary, generally one commissioned with authority under the Emperor and the Pope, for remeid of law at fitting time and place—all such instruments being carefully preserved—while rights proceeding from the Crown were recorded, as a rule, in public registers in the custody of public officers familiar with their contents—registers which furnished the means of testifying to such rights in the numerous cases where private castles or residences were burned with charter-chests and their contents, as was so frequently the case in the wars between the great feudal families. It would, in short, have been very difficult for any peer in 1606 to withhold such evidence as Lord Chelmsford speaks of. The inter-relations of feudal life, descending link by link from the Crown to the humblest sub-vassal—every act performed in public, with attendant ceremonies and usually well-written instruments of certification, even the investiture of a parish-clerk in his office being thus recorded—were utterly inconsistent with the possibility of concealment; while the fact that the highest nobles usually acted in all affairs of

consequence with the assistance of their “concilia” or petty parliaments, equally extended the sphere of publicity within which they walked, for good or for bad, in the sight of their brethren.

(3.) The third and final charge against the Decreet of Ranking and the Union Roll, from a general point of view, as imperfect and inaccurate, and thus unsusceptible of being founded on in argument in any case (and specially in that of Mar), is based by Lord Kellie :—1. Upon an alleged discovery to that effect by the House of Lords between 1708 and 1739, which occasioned the supersession of the Roll, or at least the aggregation to it of an amended roll in 1740 and 1847, the latter drawn up by the Lord Clerk Register in obedience to an order of the House of Lords, and which is still the regulating roll called at the elections at Holyrood; 2. Upon *dicta* of noble and learned Lords in Committee for Privileges in depreciation of the Decreet of Ranking, and upon the authority of Mr. Riddell to the same effect; and 3. Upon the liability of the Decreet of Ranking to be reduced by any peer having an interest, and the fact that it was thus reduced in consequence of inaccuracy in instances specified,—thus practically illustrating the superficiality of the inquiry of 1606.

My answer to these articles of challenge cannot be given in as few words as those in Lord Kellie’s Letter of courteous defiance.

1. If the reader will refer back to Lord Kellie’s Letter he will perceive that the statement on the first of these points is that—

“Between the years 1708 and 1739 the imperfections of the Union Roll appear to have been discovered by the House of Lords, who took steps for obtaining a more accurate list of peers, by issuing an order on the 12th of June 1739, that the Lords of Session should make up a roll of the Peers of Scotland at the time of the Union whose peerages were still subsisting. The Lords of Session made their return in the following year. They reported that,—‘After the most careful search and examination, they have not hitherto found among the records any roll or list of the Peers of Scotland at the time of the Union, authenticated by the subscription of the Lord Register, or by any other person or officer whatsoever. All they have been able to meet with to give satisfaction in this particular, is an unsigned writing on a sheet of paper, entitled “Roll of Parliament 1706,” bearing a list of the Peers according to their ranks.’”

This account by Lord Kellie of what took place in 1739 and 1740 is too meagre to be intelligible, and leaves an erroneous impression, the natural consequence of its conciseness.

The "imperfections" of the Union Roll alleged by Lord Kellie, as discovered by the House of Lords between 1708 and 1739, can only refer to the fact that many peerages had become dormant or extinct during that interval, while some had been assumed by persons whose claims were very distant and dubious—this, however, being to their discredit, not that of the Roll. There was no question of erroneous ranking as regarded precedence—these were two very different matters which ought not to be confounded together. The expression, "a more accurate list of Peers," can only refer to the peers themselves, not to any inaccuracy in the Roll itself; while, if any inconvenience existed, it was on the score of superfluity, the effect of time having eliminated certain entries, not of original "imperfection." Proceeding to the substance of Lord Kellie's statement, I have to observe that it suggests that the Roll now in use is no longer the Roll of 1707, which has been superseded through imperfection and inaccuracy, and that this supersession has been effected by lawful authority. The difficulty found by the Lords of Session in 1740 with regard to the Roll of Peers existing at the time of the Union, merely shows the extraordinary ignorance that existed on the question at that time in Scotland. The sheet of paper entitled "Roll of Parliament 1706, being a list of the Peers according to their ranks," being unauthenticated by the Lord Clerk Register or by any official authority, was utterly worthless; and the clerks of the House of Lords must have smiled on perusing this passage of this Report when they had the entry before their eyes on the Journals of the House of the certified list, duly sent by the Lord Clerk Register, of the Peers of Scotland as they stood on the Rolls of the Scottish Parliament on the 1st day of May 1707—in other words, the Union Roll. The Lords of Session in 1740—or rather the eminent man who drew up the Report which they adopted, and which was forwarded to the House—cannot have been aware of this transmission and entry. It might be thought from Lord Kellie's words, apart from this explanation, that the Union Roll depended on no higher authority than a similar piece of unauthenticated waste paper. The

Report of the Lords of Session in 1740 constituted a sort of commentary on this Roll of 1706, this sheet of paper, thus fortuitously preserved in Edinburgh, doubtless accurate for practical purposes, distinguished by the peerages which had descended continuously without break to their actual tenants; then those of which the continuity had been broken; and upon those peerages this Report makes many valuable remarks. But neither the application of the House of Lords nor the Report of the Court of Session had anything to do with the accuracy of the Decreet of Ranking or of the Union Roll in respect to the precedency of peers, or the right of the peers whose precedency was thereby determined to be on the Roll. I may add that the Report was drawn up exclusively by Duncan Forbes of Culloden, the Lord President of the Court of Session, a man of the highest ability and integrity, but better acquainted with constitutional law than with matters of genealogy; while the facts that the researches which he undertook with conscientious care, and which actually dealt with "all the Peerages of Scotland," were confined within the space of eight months; that he had no power to call for evidence, but drew up the report from his own knowledge, practically single-handed, and during the intervals of official work; and that his colleagues of the Session in whose joint names the Report was sent had nothing to do with it except adoption, signature, and transmission to England, while the Report possesses no judicial character—these facts place the Report of 1740, *mutatis mutandis*, far below the level of the Decreet of Ranking in point of weight and authority.

Lord Kellie continues his narrative upon this head as follows:—"The lists or notes which were furnished by the Lord Clerk Register to the House of Lords in 1708, and by the Lords of Session in 1740"—the latter being the unsigned list thus above spoken of, with the comments in the Report signed by Lord President Forbes, "continued to be the rolls of the Scotch Peers till the year 1847, when, under a special Act of Parliament for correcting abuses at the election of Scotch Peers owing to the imperfection of that Roll, the present one was made up by the then Lord Clerk Register; and it is still the regulating roll called at the election of Peers, with such additions and corrections as have been made by order of the House

of Lords." There is scarcely a clause here which does not convey an impression the reverse of what a few words will show to be the truth.

In the first place, the Union Roll and the lists sent up in 1740 never enjoyed this co-ordinate authority as "the rolls of the Scotch peers" up to the date of 1847 specified. They were fundamentally identical, but only the Union Roll was of authority. The "special Act" referred to by Lord Kellie as passed in 1847 for correcting "abuses" at elections "owing to the imperfections of the Roll," was for the purpose of preventing persons claiming to vote in right of peerages existing on the Roll being permitted to do so before establishing their right thereto—a laudable object, although the means devised to attain it and prescribed by the Act were *ultra vires* of the Legislature, as I shall show in due time. But these "abuses" were owing to no "imperfections" in the Roll, *i.e.* the Union Roll, but rather to its redundance, as I have already observed, the existence upon its face of dignities which became either dormant or extinct in the interval, the question being that of the continued existence, not of the relative precedency, of the dignities. The roll "made up" by the Lord Clerk Register in 1847 was not the result of a revision or readjustment of materials, much less an elimination or correction of such by the aid of a discriminating and quasi-judicial process, but simply a shorter roll abridged from the Union Roll, by omission of peerages upon which no vote had been tendered for fifty years, for the purpose of preventing any vote being tendered thereupon without proper authority from the House of Lords—but observing the same precedency. It was purely for convenience by a questionable stretch of power on the part of the House of Lords, and calculated to exert a prejudicial effect, which has been already apparent. The House possessed no power to supersede or curtail the original and standing Roll in its integrity; and no peer of Scotland can for one moment be called to look upon this truncated list as of authority, or binding upon his recognition as respects the "additions" or "corrections" spoken of, as "made by order of the House of Lords." I say all this in vindication of the standing authority of the Union Roll as distinguished from the substitutes, which may shine brightly as kings in Lord

Kellie's eyes, but are mere farthing rushlights in themselves, when the Roll itself—the “*rex rotulorum*”—is appealed to. Meanwhile, of the “additions” and “corrections” referred to, the “additions” consisted merely of peerages supposed to have been dormant or extinct, but which had been recognised as existent and inserted on the roll by order of the House of Lords, after the Crown had judged favourably of the reports of the House upon claims to those peerages between 1707 and 1847; but these “additions” implied no “imperfections” in the Roll in the sense of that fundamental inaccuracy which gives point to Lord Kellie's objection. But with regard to “corrections” on the Roll by authority of the House, otherwise at least than as the abridgment of the Roll in the manner above stated in 1847 can be described as correction, I am aware of none, unless it be in regard to peerages forfeited in 1715 and 1745 and subsequently restored; and no “order” of the House of Lords would at any time warrant “correction” upon the Roll in alteration of the precedence determined by the Decreet of Ranking, and the judgments of the Court of Session, constituting collectively the Union Roll.

These expositions will, I trust, supply a response to Lord Kellie's concluding assumption on the above score, viz., that “the unsatisfactory and imperfect nature of the Decreet of Ranking in 1606, and the subsequent roll of peers from that date to the Union, and from 1740 to 1847, will be apparent from the history now given.”

2. I proceed to Lord Kellie's second basis for the present objection as given in his Letter:—“The errors in the Decreet of Ranking have frequently been remarked upon in the trial of Scotch peerage cases. It was much founded on by one of the claimants in the Herries case, which was decided by the House of Lords in 1858. In moving judgment, one of the law Lords” (Lord Cranworth) “referring to it said, ‘It cannot by any means be taken as conclusively establishing the relative rank of the different peers.’ And another of the Lords” (Lord Redesdale, who dissented from the Resolution arrived at) “said—‘The incorrectness of this Decreet is so clearly proved, that no reliance can be placed upon it unless otherwise supported. It is disputed constantly at the election of Scotch Peers to this day. It was made up in some cases from evidence

produced by the peers themselves, several of whom did not appear before the Commission.' The Decreet," Lord Kellie adds, "was also founded upon by Mr. Goodeve Erskine in the claim to the Mar Peerage in the House of Lords. It was very fully discussed at the hearing of the case, and very little attention was paid to it, owing to what Mr. Riddell calls its gross errors and glaring inconsistencies"—a reference which I shall take up in due time. "It is absurd now to attempt to uphold such an imperfect document, as if it were equal to a final and irreversible judgment on each particular case of peerage mentioned in the Decreet,"—a view of it which is contradicted by its very terms, by the reference which it contains to the Court of Session, and which neither I nor any other Scottish antiquary or advocate has ever, I believe, set forth.

Lord Kellie attaches more weight to the *dicta* of the law Lords quoted by him in depreciation of the Decreet of Ranking than I can recognise, holding, as I do, that such *dicta* are valuable more or less in proportion to the competency of the individual spokesman to advise upon matters of Scottish law; while it is now admitted, even by the House of Lords (although not apparently by Lord Kellie), that the opinions of noble and learned Lords in Committees of Privilege are not judgments, but the mere expression of the *rationes* on which they supported the Resolutions arrived at by the House. But if the "little attention," in the sense of disrespect, which he attributes to the view taken of the Decreet by Lord Chelmsford, Lord Redesdale, and Lord Cairns in 1875, be an argument against me, I can furnish him with a stronger instance from the history of the Montrose claim in 1853. That claim turned in one aspect in an appreciable degree upon the continued existence of the Earldom of Glencairn since its creation in 1488, and upon a series of decreets by the Court of Session proceeding upon an original inaccuracy in the Decreet of Ranking of 1606, which the Court was called upon to redress, and did rectify. So little attention was paid to the Decreet of Ranking by the noble and learned Lords who addressed the Committee on that occasion, that Lord Chancellor Cranworth commenced his observation on the subject by the words, "A Decreet of Ranking, as it is called, was made—I believe by the Parliament" (!), "by which they classed the peers according to their

order," while Lord St. Leonards, although he dealt in a way which I shall exhibit with the decret of the Court of Session in favour of Glencairn in reversal of the ranking of 1606, absolutely omits all mention of the latter—the foundation of the whole superstructure. If such be the authorities marshalled against the Decreet of Ranking and the Union Roll, Lord Kellie, who attaches such importance to Lord Mansfield's ruling on the subject of heirs-male, might have noticed the respect with which that great, although not always infallible, authority regarded the Decreet in his speech upon the Sutherland claim—deriving from the Sutherland precedency, as there settled in relation to other dignities, a special argument in favour of the heir-general, which I shall presently show in answer to the challenge both of Lord Kellie and of Lord Redesdale, to be equally applicable in favour of the heir-general of Mar, as derived from the precedency awarded to that Earldom in that much-controverted Decreet.

Respecting Mr. Riddell's censures on the Decreet of Ranking, as cited in Lord Kellie's Letter, to which I refer the reader—although the words just used, "its gross errors and glaring inaccuracies," do not appear in the passage—Lord Kellie citing it with express notice that I have styled Mr. Riddell my "friend and father in genealogy and peerage law"—I have this to say:—Apart from the remembrance of personal friendship, I speak always with the respect which is due to Mr. Riddell, who did more than any one man since Lord Hailes to vindicate the ascendancy of the judgment of the Court of Session in all matters affecting dignities, and the genuine law of Scotland, especially in the matter of succession, as against the revolutionary innovations, the modern doctrines of the House of Lords, derived by tradition from Lord Mansfield, Lord Camden, and Lord Loughborough. But when I find law and authority opposed, I own no deference but to law. If the preceding exposition be correct, the Decreet and the Union Roll are entitled to more respect than Mr. Riddell's words would sanction. But Mr. Riddell's work, quoted by Lord Kellie, was published, as he himself states, in 1842, and he modified his views, as I well know, in some important respects as to the "Decreet of Ranking," in consequence of the investigations made before, during, and after the Montrose claim; and most certainly

he never for one moment doubted that the Decreet was accurate with respect to Mar, as between the ranking assigned to it from 1404 and any former date—his sole complaint being, as expressed in the very work Lord Kellie cites from, that the Earldom was not ranked as first among all the Earldoms of Scotland. In that same work, Mr. Riddell vindicates the principles upon which precedency was allotted by the Commissioners in more than one respect where they are impugned by Lord Kellie, as we shall see in the ensuing section of this Letter.

3. It remains for me to deal with the third basis of Lord Kellie's general objection now before us, viz., that the precedency awarded by the Decreet of Ranking have been found to be erroneous in certain instances, and that the Decreet is thus discredited. Lord Kellie's words are,—“It (the Decreet) was liable to reduction at the instance of any peer having an interest, and it was reduced by the Court of Session at the instance of the Earl and Countess of Buchan, and more than once altered in the case of Glencairn,”—words which those conversant with the facts may accept as accurate, but which to those not conversant with the facts cannot but have the practical effect, uttered as they are and taken with the context of Lord Kellie's remarks, of suggesting error (from whatever cause) on the part of the Commissioners, vacillation of opinion and contradictory judgments (as implied by the phrase “more than once”) on the part of the Court of Session, and a general taint of inaccuracy and untrustworthiness characterising the entire series of inquiries, and reflecting on the Union Roll as their ultimate outcome and expression. It is evident that these suggestions, if well founded, would establish a serious case of discredit against the value of the Decreet, even as corrected by the Court of Session, in all other cases, and specially in the issue to that of Mar. Lord Kellie points his conclusion, connecting the present general objection with the special ones that follow, in the following concatenation of impeachment:—“The mere superficial inquiry by the Commissioners in the course of a few months in the year 1606, regarding the whole peerage of Scotland, cannot be put in competition, in so far as the Mar Peerage is concerned, with the exhaustive inquiry which was made during several years for the purpose of adjudicating

on the constitution and descent of that dignity,"—an inquiry, I may observe, not so exhaustive as to ascertain the fact that the entire question had been already discussed and determined in favour of the heirs-general during the period between 1565 and 1626, and notably recognised by the Commissioners of 1606, by the Kings and Parliaments of Scotland, and by every subsequent intervention of authority down to the commencement of the inquiry wound up in 1875.

It will be manifest on the slightest reflection that the present objection proceeds on the attribution to the Decreet of 1606 of a finality which was not contemplated by the constitution of the Commission which pronounced it, and which that Decreet itself repudiates. The objection presumes that the corrections made by the Court of Session discredited the Decreet, whereas they were merely supplementary to it, in the development of the provision for securing ultimate accuracy, which is the leading and characteristic merit of the Decreet itself,—the objection still further overlooking the correlative provision that when the precedencies awarded were not challenged, they must stand till they have been reduced. It equally overlooks the fact that while the corrections in the cases of Buchan and Glencairn, involving change in the relative precedency of many other peers, were simply the complement and completion of the Decreet in its character of the Roll of the Peers in Parliament, the inability of any interested party to establish a case of misranking against the Earldom of Mar as the ancient dignity ranking from 1404 stamps the ranking of the Earldom in the Decreet with correctness, while the operation of the Act of prescription in 1617 fixed that correctness indelibly beyond the reach of cavil or contest when once the period of forty years had elapsed, as it did elapse in the case of Mar without any process, or even protest, against his precedency. And, lastly, the objection overlooks the fact that, while no one ever ventured to impugn the Mar precedency, the contention was all the other way, as I shall show in the ensuing Letter,—that is to say, on the part of Mar for higher precedency that had been awarded to him, for the first place among the Earls of Scotland.

It is impossible for an adequate answer to be given to the present objection without a clear exposition of the cases of

Buchan and Glencairn adduced by Lord Kellie; especially as regards the alterations which he states were more than once made upon the Decreet in the case of the latter dignity. These two cases are full of interest and instruction. They will also contribute to the exhibition of the true value to be adjudged to the *dicta* of noble and learned Lords in Committees for Privileges in *disprezzo* of the Decreet of Ranking and the Union Roll.

The correction of the precedency assigned to the Earldom of Buchan in the Decreet of Ranking took place in 1628, as the result of an action of reduction and declarator before the Court of Session, at the instance of Mary Countess of Buchan in her own right, and James Earl of Buchan, her husband, who bore that title by the well-known courtesy of Scotland. I may pause for a moment to remark that the Countess Mary was daughter of another countess in her own right, Christiana Countess of Buchan; and that both mother and daughter inherited under a royal charter and regrant of the lands of the Comitatus or Earldom in favour of Mary's grandfather, John, third Earl of Buchan, on his resignation, 4th August 1547, that charter containing no specification of the dignity, and substituting the limitation "*hæredibus suis*," including heirs-female, for a previous limitation to heirs-male. The reader will observe the parallelism here—between Mary and Christiana Countesses of Buchan and Isabel and Margaret Countesses of Mar, and between the two charters of the respective fiefs, without any specification of the dignity, and with the limitation "*hæredibus suis*," under which the Countesses Christiana and Mary in the case of Buchan, and Earl Robert in the first instance and Earl John in the second in that of Mar, succeeded to the respective dignities—these charters being the charter of 1547 in the case of Buchan, and the charters of 9th December 1404, 21st January 1404-5, and 23d June 1565, in the case of Mar—as recognised in the Act of Parliament 29th July 1587, and in the judgment of the Court of Session in 1626. Lord Mar's opponents cannot take a step in derogation of his rights without evoking witnesses from the very earth they tread on to testify to those rights, and to denounce as accusing genii the injustice of their opposition.

The action brought by the Countess Mary was against

the Earls of Eglinton, Montrose, Cassillis, Caithness, and Glencairn, as unduly ranked to her prejudice. The Countess, being a minor in 1606, did not appear, and her guardian would appear to have neglected that duty: and the ranking was thus too low, dating in fact apparently from the charter of 1547, which the Commissioners probably knew of through the Lord Clerk Register, and not from the original charter of creation in 1469. No opposition was offered by the defenders to what evidently was considered a just claim; and the Decreet of Ranking was reduced accordingly in the Countess's favour by a decret of the Court of Session, 5th July 1628, to the effect of displacing the five earls above mentioned to the extent of placing Buchan above them.

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But while Lord Kellie's allusion to the case of Buchan might have been passed over briefly but for this interesting and unsuspected illustration of the argument for the heir-general of Mar, I lay my finger on his reference to the reduction of the Decreet of Ranking "more than once" in the matter of the Glencairn precedency, as calculated to create prejudice on the grounds above stated; while, in actual fact, the circumstances afford, far beyond the case of Buchan, the most striking illustration of the intervention of the Court of Session in rectification of the shortcomings, not of the Commissioners of 1606, but of the peers who were summoned to produce their evidence, but failed to do so, and of the respect and deference with which that intervention was recognised by the legislature, alike on constitutional grounds and as binding *per se* on Parliament. The facts are simply as follows:—

The Earldom of Glencairn was created by James III., by patent, or more correctly speaking, by charter, in favour of Alexander Lord Kilmaurs with limitation "hæredibus suis," on the 28th May 1488, at the culminating point of a great rebellion headed by his son, James IV., who succeeded as such on the death of his father at the battle of Sauchieburn on the 11th June, but a few days after the grant of the earldom. The battle was succeeded by a proclamation, of which nothing is known, and by an Act of Parliament passed in the succeeding Parliament, 17th October 1488, usually styled of late years the Act Rescissory, rescinding in general terms "all alienations of landis, heritage, langtakkis, feufermez, offices, tailzies,

blanche ferm, creacion of new dignities" granted by the late king during the preceding eight months—with respect to which I may mention that the clause "creation of new dignities" related exclusively to grants of regality or royal jurisdictions, as I have recently ascertained. The Act took no effect on any one of King James's grants, and most certainly not on the charter of the Earldom of Glencairn. Earl Alexander, the grantee, was killed at Sauchieburn, and his son and grandson abstained from assuming the dignity, out of motives of prudence, for some years: but the latter was ultimately recognised as Earl of Glencairn in 1503. The charter or patent of 1488 is, by a ruling final decret of the Court of Session, 19th January 1648, now to be noticed, the only constitution of the Earldom, valid and standing notwithstanding the Act Rescissory, every attempt to prove a subsequent grant having proved ineffective, and the suggestion of a lost patent having been rejected.

Earl Alexander's descendant, James Earl of Glencairn, "did not compear" before the Commissioners in 1606. The Glencairn charter had not been recorded in the Great Seal Register (by no means an infrequent occurrence), and the original had been mislaid when the Decreet of Ranking passed. The Commissioners accordingly gave him precedence according to the earliest evidence of the existing Earldom that came to hand, to the effect of postponing him to the Earls of Eglinton, Montrose, Cassillis, and Caithness, all of whom produced evidence of earlier date, although, if the charter of 1488 had been produced, it would have placed him above them all. The missing charter in question was discovered in 1609; and in that year the Earl of Glencairn brought an action of reduction and declarator before the Court of Session in accordance with the provisions of the Decreet of Ranking, summoning Eglinton and Cassillis, but overlooking Montrose and Caithness; upon which summons and production of the charter, decret followed on the 7th July 1610 in Glencairn's favour, no opposition being offered. But, as the decret was in absence of the two Earls, defenders, and Montrose and Caithness had not been summoned, as they ought to have been, and the effect of the decret of 1610 was to create confusion in the ranking in consequence of this omission, the judgment was not final. Eglinton accordingly in 1617 brought an action of reduction of the

decreet of 1610, on the ground just specified exclusively; and, the informality being proved, a decreet was passed in Eglinton's favour, reversing the decreet of 1610, and by which matters were replaced in their original state, precisely as if nothing had intervened between 1606 and 1617. Glencairn held thus a subordinate precedence, in consequence of the decreet of 1617, at the time of the Countess of Buchan's process of 1628 above spoken of. But Glencairn returned to the charge in 1637, by a formal summons, embracing all the four Earls ranked before him in the Decreet of 1606; and after several years' litigation, and the parties meeting *in foro contentioso*, and with the assistance respectively of the ablest advocates in Scotland, the Court of Session issued a final judgment on the 19th January 1648, sustaining the validity of the charter of 1488 against the Act Rescissory, and reversing the Decreet of Ranking to the extent of assigning the precedency to Glencairn on the exclusive ground of the validity of that charter.

It may be noticed here, as an interlude during a lull in the process, that Glencairn, from whatever cause and under evil advice, attempted by a supplication to the Estates of Parliament in 1641, to induce them to take up his cause and decide it on their own authority. But the Parliament refused to do so, passing a "deliverance" or order 15th June 1641, to the effect that Glencairn's "sitting and voyting in Parliament at this time shall nowayis be prejudiciall to him in the right of his place whensoever he shall intend persute for the same befor any judge competent; and siclyke that this answer or reference shall not in any sort prejudge those other noblemen or any of them in thair richtis or possessioun, and just defences of the same, as accordis of the law;" thus referring all the parties to the only competent tribunal, the Court of Session.

But a change had passed over the spirit of Parliament between 1641 and 1649, the year after the death of Charles I. The circumstances under which the charter of the Earldom of Glencairn had been granted by James III. to Alexander Lord Kilmaurs in 1488 were exactly parallel with those under which the patent of the Marquesate of Montrose had been bestowed on the illustrious Earl of that name by Charles I. in 1644—in each case as the reward of loyalty against treason. Eglinton urged this parallel through his friends on the men in power;

and the Parliament, then in rebellion, took up the matter (although constitutionally incompetent so to do), and by two decreets of the 2d and 9th March 1649, the first at the instance of the public prosecutor, the second at that of Eglinton, annulled the charter of the Earldom 28th May 1488, and rescinded the decret of the Court of Session, 19th January 1648, on the avowed ground, as stated in the first of the two decreets, "that it is of dangerous consequence and example in relation to the troubles of this kingdom occasioned by evil counsel given to the King's Majesty" (Charles I.), "and assistance thereto, that the said gift and patent" of the Earldom of Glencairn, "graunted for evil counsall and assistance given to the King" (James III.) "should be of any force or validity, or should be made use of,"—in consequence of which the Estates proceeded to ordain that, "if William Earl of Glencairne, or any other his airis or successoris, shall at any tyme heirafter mak use of the forsaid pretendit principall patent in judgement or outwith the samene any manner of way, the said Earle of Glencairne and his aires and assignayes forsaidis, makers use of the foirsaid pretendit principall patent, are and shall be incapable of the dignity of Earl thairin specifeit, and shall not brook nor enjoy the dignity and title of Earle by vertue of anie other right at no tyme heereafter." The effect of the second decret of 9th March 1649 was to replace Eglinton and the other three Earls (excluding Montrose, under the designation of "James Graham," as they had forfeited him) in the precedency. But, in the first place, not only had Parliament no jurisdiction in the matter, the jurisdiction being exclusively in the Court of Session, so that their action was *ultra vires*, and their two decreets null and void as proceeding *a non habente potestatem* under any circumstances; but, further, the entire Acts of the Parliament in question, including the two decreets, were formally rescinded by Act of Parliament after the Restoration, restoring the decret of the Court of Session in favour of Glencairn, 19th January 1648, to its full validity and universal recognition. On one occasion only afterwards were the relative precedencies of Glencairn and Eglinton, fixed by the decret of 1648, inverted on the Roll of Parliament, on the 17th January 1650. But this was immediately followed by a protest by Glencairn, 3d June 1651, appealing to the decret of 1648: the mistake was

rectified at the earliest opportunity in the next Parliament, and the ranking, thus corrected by the Court of Session, with full recognition by the Parliament, was adhered to till the Union, stands at present on the so-called Union Roll, and determines the relative precedence of the Peers (for the Earldom of Glencairn is dormant only, not extinct) at the present moment.

It thus appears that, although the ranking of Glencairn in the Decree of 1606 has been altered, as Lord Kellie states, "more than once," in 1600, 1647, 1648, 1649, and 1650, it has never been so altered as to warrant the inference which Lord Kellie's words—incautious words, as I assuredly believe, but not the less misleading—suggest. The original alteration in 1610 by decree ultimately stood; the rescission of that decree in 1617 was purely upon a technical informality; that informality was rectified, and the original correction of 1610 re-affirmed, in perfect consistency, in 1648: the judgment of 1648 was set aside by the outrageous and illegal action of a Parliament in rebellion: but the Act Rescissory of 1660, which swept away that Parliament with all its Acts, restored the judgment of 1648 once more to its legal force and recognition. The words "more than once," true to the ear, are thus erroneous in sense. The principle of the correction in 1610 was never reversed; for it is impossible to describe the mere quashing of that judgment in 1617 on a pure informality as imputing discredit or vacillation to the Court of Session.

But if the Three Estates constituting the Parliament of Scotland at all times respected and upheld the Decree of Ranking and the corrective decrees of the Court of Session, and the decree of 1648 in particular—except while in rebellion—this example has not been followed of late years by that single Estate or House of the Parliament of Great Britain which might have been supposed the most earnestly conservative of constitutional and legal principle. The narrative of the vicissitudes of the Glencairn precedence and the present exposition of the law as affecting the Decree of Ranking and the decree of 1648, would be incomplete without some few additional words tracing its history very briefly down to the present time. In a word, the House of Lords stands committed to a disallowance of the judgment of the Court of Session in

1648, and of the Union Roll, and to a recognition of the Decreet of Ranking as right in the precedence originally accorded to Eglinton and the three other earls above Glencairn; and thus to a very awkward state of chronic collision with the supreme authority of the Court of Session, their final judgment of 1648, and the protective sanctions of the Treaty of Union,—the House having no authority to advise the Crown otherwise than in accordance with the judgment of 1648; and all that has followed upon that advice has been necessarily *ultra vires*. I have now to speak of the Glencairn claim in 1797, and of the Montrose claim in 1853, so far as the Decreet of Ranking and the judgment of the Court of Session of 1648 are concerned.

The representation of the Earls of Glencairn having divaricated in the seventeenth and the last century between the heirs-general and heirs-male, the dignity was claimed in 1797 by the heir-general, Sir Adam Fergusson of Kilkerran, by petition to the Crown; and the claim being referred to the House of Lords, the Lord Chancellor Loughborough (otherwise Lord Rosslyn) advised the Committee, which reported to the House, and the House to the Crown, that he had not established the claim. Sir Adam, standing necessarily on the decreet of 1648, claimed under the charter of 1488 and the limitation "*hæredibus suis*," whether rightly or not (in respect of the interpretation of that limitation) may be the subject of a future observation. The Court of Session had in 1648, as we have seen, declared the charter to be valid, as not affected by the Act Rescissory of James IV., and upon that ground exclusively reduced the Decreet of Ranking to the effect of giving Glencairn the precedence, which, as I have stated, stands accordingly on the Union Roll, and is binding at the present day. But Lord Loughborough, the only peer who spoke on the occasion, affirmed that the judgment of 1648 was not founded on the charter of 1488, and that the Act Rescissory must be understood to have cut down that charter, passed over the Decreet of Ranking and the Union Roll in utter silence, and advised the Committee that the Act Rescissory did annul the charter, and consequently that Sir Adam Fergusson had no claim under it; and, therefore, that the existence of the dignity must be referred to a lost patent—a plea which had been urged by Eglinton in 1648, but which was disallowed by the Court of

Session—the presumption under which absence of a patent must, according to the rule established in the Cassillis and Sutherland claims, be in favour of the heir-male against the heir-general. It follows that, were the Glencairn heir-male to claim under this lost patent, the private rule of 1762 and 1771 (and, I may now add, of 1875), and Lord Loughborough's decision, and obtain a favourable report from the House, Eglinton and the other peers postponed to Glencairn in 1648, and so ranking in the Union Roll, might claim to be restored to their original precedence by an alteration of the Union Roll; and were the House to make an Order on the subject—as they made a practically similar Order in favour of Lord Kellie in 1875—directing that the Earl of Glencairn should be called in the place and precedence originally assigned him by the Decreet of Ranking, it would be open to Eglinton himself, as an honourable gentleman and good patriot, or any other Scottish Peer, to refuse to recognise such unwarranted pretensions, and prosecute an action before the Lords of Session, calling upon them to sustain their final judgment of 1648 against their rescinded judgment of 1617, and the Decreet of Ranking, upon which alone Glencairn could be deprived of his existing and legal precedence. It is hardly necessary to remark that Lord Loughborough was wholly in error in the supposition that the decreet of 1648 was not founded upon the charter of 1488, as unaffected by the Act Rescissory; and that his passing over the standing fact of the precedence of the Earldom of Glencairn on the Union Roll, under the judgment of 1648 reducing the Decreet of Ranking in that particular, was still less excusable.

But this is not all; for in the claim to the Dukedom of Montrose in 1853—notwithstanding the fullest exposition of Lord Loughborough's errors—Lord Cranworth and Lord St. Leonards, in their so-called “judgments,” reiterated and enforced, them all, to the effect of recommitting the House to the untenable position of supporting the interim award of precedence to Eglinton by the Commissioners of Ranking in 1606, against the corrective judgment of the Court of Session in 1648, acting not only on their supreme authority *in civilibus*, but as the court of final appeal under the salvo in the Decreet of Ranking itself, and thus against the Rolls of Parliament from 1667 to the Union, the Union Roll itself, and the protective sanctions of

the Treaty of Union, under all of which Glencairn stands before Eglinton and the other Earls to whom he was originally subordinated. The circumstances are briefly these :—

The original Dukedom of Montrose and the Earldom of Glencairn were created under precisely similar or rather identical circumstances by James III., within ten days of each other. Both of them were represented by Eglinton in 1648 as having been cut down by the general Act Rescissory, under the clause “creation of new dignities,” after the accession of James IV. Had this been so in the case of Glencairn, Eglinton would have been entitled to the precedence before Glencairn accorded to him, in the absence of the charter or patent of 1488, by the Commissioners of Ranking. But the Court of Session, by the decret of 1648, with the patent before them, decided that the Act Rescissory took no effect on the Glencairn charter, which stood valid as the sole creation of the dignity. My father, the late Earl of Crawford, claimed the Dukedom of Montrose (among other grounds) upon this judgment of 1648, the two dignities being in the same boat so far as the Act Rescissory was concerned, that Act being admittedly the only bar to its recognition; while he contended, further, that by all principle and precedent the Act could not have had the effect ascribed to it. But Lord Cranworth and Lord St. Leonards, laying it down that the decision of Lord Loughborough in 1797 was binding on the House, right or wrong—in the face of the fullest proof that he had been in error throughout in matters of fact as well as law, and that the judgment of the Court of Session was final, and such as it would be *ultra vires* of the House to ignore and disallow—dismissed the claimant’s argument, on the ground that the three Glencairn and Eglinton decreets, the ruling one by the Court of Session in 1648, and the two by the Parliament in rebellion in 1649, were of equal force and validity, thus neutralising each other, and leaving the way open for the House to report against the Montrose charter of 1488 and Lord Crawford’s claim, on the ground that the Act Rescissory had cut down the charter, even as it had cut down that of the Earldom of Glencairn. The words of the noble and learned Lords were as follows, and I quote them the rather, as I think it not improbable that they may have influenced Lord Kellie’s mind while penning the three words “more than once,” to which I

have been compelled to devote so many pages—although not more than they deserve:—After a review of the successful decret, and denial that there was anything in the judgment of the Court of Session in 1648, “which shows that they acted upon the Act Rescissory at all,” which is directly against the evidence, Lord Cranworth concluded: “But, my Lords, it is idle not to see that to derive any precedent to guide your Lordships from the transactions of those troublous times would be really to shut your eyes to what must have been the truth of the case. The Court of Session decided one way, and, as a matter of course, Parliament decided the other way. And afterwards, when the tables were again turned, the new Parliament revoked what the former Parliament had done.” Thus, while assuming that the Court of Session and the Parliament were equally liable to undue influence, equally corrupt, and that Parliament had as much right to adjudicate in the matter as the Court of Session, Lord Chancellor Cranworth, constrained to admit that the decision of the Court of Session ultimately stood and has ruled ever since, concluded that the House ought to reject all evidence, all rulings on the subject, one way or the other, so as to leave the House at liberty to report against the charter. Lord St. Leonards treated the case very nearly in the same way. He began by an argument to prove that the Court of Session had no jurisdiction in dignities, concluding: “Then, my Lords, the exclusive jurisdiction of the Court of Session falls to the ground. But I do not myself see,” he proceeded, “that this matter has any important bearing upon the argument either one way or the other. Your Lordships see that exactly as either the one power or the other preponderated, so was the decision. If you will tell me the date of the Parliament, and want to know the decision, I will tell you what it was; because, knowing who was in power, I should know what the decision was. The decision always went according to the power which at the moment ruled; and that very resolution of 1648” (Lord St. Leonards thus speaking of the judgment of the Court of Session as if it had been a resolution in Parliament) “was upset by a resolution of Parliament in 1649” (meaning by this the pseudo-judgment or decret of the rebellious Parliament 9th March 1649); “and that Parliament itself was again struck at by a subsequent resolution” (that is,

by the great Act Rescissory or of Revocation, by which the proceedings of the rebellious Parliament were deemed null and void in 1662). "But what does it all amount to? only that there is a continual uncertainty, a continual fluctuation in the decisions upon the subject, which detracts from the weight which otherwise might be given to any one of those decisions, or to all of them taken together."

These extracts may show the utter misapprehension as to the authority of the Decreet of Ranking as corrected by the Court of Session, and of the Union Roll as resting upon these two pillars, which prevailed in 1853, a period when, according to Lord Campbell, the administration of justice in the House of Lords had sunk to a very low ebb; and which misapprehension lies at the root of the contention in Lord Kellie's Letter against my argument in favour of the continued existence of the ancient Earldom of Mar, as testified to by the precedency assigned to it by the Decreet of Ranking and the Union Roll, and never questioned till 1875. The *dicta* of Lord Cranworth and Lord St. Leonards above quoted can, of course, only be accounted for by a blind and hopeless confusion in their minds of what was legal and constitutional, standing and ruling at the present moment, with what was illegal and unconstitutional, and which never had anything but a spasmodic existence during the fever fit of anarchy and rebellion culminating in the murder of Charles I., and to which a happy end was put by the Restoration. It was a strange shifting of the scenes, an unlooked-for change in dramatic character, a quaint illustration of the irony of fate, that a Whig Lord Chancellor, boasting of the "omnipotence of Parliament," and a Tory ex-Chancellor, the law officers of a Sovereign, the heir alike of James III. and Charles I., who lost their lives in opposing revolution, and the descendant of that "James Graham," the great Marquess, whose patent was so distasteful to the rebels of 1649 that they sought to crush it down in principle by crushing down that of the Earldom conferred for similar loyalty in 1488 on the house of Kilmaurs, should all have been found in combination in 1853, against public policy no less than private justice, to support the Act of a Parliament, the leaders of which were under the papal excommunication in 1488 as the murderers of James III., and the decreets of a Parliament whose members in 1649 were

supporting a cause, by their own confession precisely identical, against the recognition of a dignity which, by the decret of the supreme civil tribunal in 1648, could not be affected by the Act Rescissory; while the Parliamentary decret of 1649, proceeding in every sense of the word *a non habente potestatem*, which attempted to sweep that judgment away, was itself rescinded in 1662—the Parliament subsequently to that year supporting the decret of the Court of Session, and the Union Roll testifying at the present day to the precedency affirmed by it to Glencairn in correction of the Decreet of Ranking of 1606.

But the anomalies of the position are by no means exhausted. While the House of Lords stands committed in the cases of Glencairn and Montrose to complicity with the rebellions of 1488 and 1649, and to the disallowance of dignities granted by legitimate Sovereigns in support of the cause of loyalty and order—the Marquesate of Montrose in the Grahams ranking with the Dukedom in the Lindsays in this category—and this through a disallowance of the final judgment of a Supreme Court, the Court of Session, in 1648, and a practical adoption of the counterdecreets of the usurping Parliament, 2d March and 9th March 1649, although rescinded after the Restoration; the House stands equally committed to a recognition of the Decreet of Ranking as correct in the precedency originally assigned to Eglinton, and the three Earls immediately next to him above Glencairn, and to the affirmation that all that has followed to the discredit of that precedency, including the Union Roll, has been in error. The inference would be to the credit of the precedency accorded to Lord Mar by that Decreet, and thus in favour of my contention, and Lord Kellie's own objection might be thus retorted to his confusion. But this inference could only be founded on through an oversight of the fact that by the views taken *ut supra* by the House of Lords, they are committed to a very awkward state of chronic collision—which I should thus be involved in—with the supreme authority of the Court of Session in 1648—as they have additionally recommitted themselves recently in their disallowance of the Mar and Elphinstone judgment of 1626—and with the protective sanctions of the Treaty of Union, the House having no authority to advise the Crown otherwise

than in accordance with those judgments, and all that has followed upon that advice having been necessarily *ultra vires*. It may be curious to consider in this connection what would be the action of the House, judging by the views of its authority upon which the Report of 1875, and the Order addressed to the Lord Clerk Register in the same breath, proceed, supposing a claim should be established to the Earldom of Glencairn, and the successful claimant should offer to vote at an election at Holyrood, in the precedency affirmed in 1628 and in the Union Roll. The Earl of Eglinton might at once allege that by the Glencairn and Montrose "judgment" in 1797 and 1853, the decret of the Court of Session reversing the precedency in 1648 had been overruled, and that the ranking in the Union Roll was incorrect, and crave an order to carry out the "judgments," more especially that of 1797. The House must either grant an Order, on the assumption of power upon which the Order at present in force against the heirs-general of Mar proceeds, or stultify itself by refusing one. If the Order were granted and acted upon, Glencairn could bring an action in the Court of Session, demanding affirmation of his rightful place on the basis of the decret of 1648. If the Order were refused, Eglinton could equally bring an action on the ground that the Court of Session had no jurisdiction in dignities, as inculcated by Lord St. Leonards in the Montrose case in 1853, or that the omnipotence of Parliament was sufficient to destroy the dignity as asserted by Lord Cranworth in the same case of Montrose. But enough of this,—I have said thus much simply to illustrate the pitfalls and quagmires into which the wisest must fall, when they walk with eyes blinded and without guidance through this labyrinth of a foreign law in which they have not been trained, such as that of Scotland.

Such is the origin, character, and sanction of the Decreet of Ranking, and of the Union Roll, as ascertained from the original sources; and it will now be evident that the objections to the Decreet in a general point of view are untenable on the three points or articles specified. The charge of "mere superficial inquiry" during only half a twelvemonth is grounded on an imperfect and inaccurate conception of its object and effect, and on inadequate apprehension of the extraneous and superior sanction by which it was accompanied. The possi-

bility of evidence having been withheld for the purpose of obtaining higher precedence than the peers were entitled to is one of so extraordinary a character, implying such an impeachment of the honour and integrity of the peers of Scotland at the time, that I hardly know how to characterise it, proceeding from such men as Lord Chelmsford and Lord Redesdale. The best refutation will be in the refutation of the special charge against John Earl of Mar upon this score in the ensuing Section. The third objection, from the instances of correction by the Court of Session in the cases of Buchan and Glencairn, has been shown to be untenable as against the trustworthiness of the Decreet in cases such as that of Mar, in which the precedence awarded has never been questioned in the only mode in which it could have been reduced, viz., by process before the Court of Session, but, on the contrary, stands at the present day by virtue of the Decreet, and is secured by prescription by the Act of 1617, no protest against it having ever been lodged.

It is evident that if the preceding General Objections are untenable, the Special Objections, to be noticed in the ensuing Section, must stand each on its own merit, and with the *onus probandi* against Lord Kellie, not *vice versa* against myself. I shall meet them however without calling in any aid except the simple testimony of fact and law—facts resting on historical evidence, not theory—law, that of Scotland, the sole criterion in these Mar matters.

#### SECTION IV.

##### *Special Objections regarding the case of Mar.*

The points of criticism are more numerous under the second head or division of the Objections against the Decreet of Ranking and the Union Roll, in regard to the special case of the Earldom of Mar; but I shall be able to answer them, I think, in less space than I have been obliged to devote to the objections under the first and broader, or general head.

Lord Kellie commences his observations on the Mar precedence in the Decreet of 1606 by an observation which I have thought hardly worthy of being included in my categorical

summary, to the effect that if the Commissioners had had any idea of the Earldom of Mar held by Earl John under Queen Mary's charter being the ancient dignity, they would have summoned him as first in order of all the Earls. In reply to this, I have to observe that the order in which the Peers are named in the charge or summons, as recited at the beginning of the decret, so far from being governed by any impressions of the nature suggested, affords the strongest possible proof of the confusion and irregularity which the Decreet was intended to rectify, unless, indeed, as I have been inclined to think, the names of the Peers, within the limits of their particular orders, were all shuffled together and inserted in the summons as they came out of the urn, so as to avoid all possible appearance of prejudgment, *petitio principii*, on the questions submitted to the Commissioners. If Mar is summoned last but five among the Earls (as in the passage in Lord Kellie's Letter, which I need not retranscribe here), Angus, who by ancient claim and general allowance was entitled to the first place and vote, is summoned seventh from the last, among a list of twenty-five Earls. And Lord Scone, the last Baron, or Lord of Parliament, created before the 5th March 1606, and ranked the last accordingly in the ordinance that concluded the Decreet, is summoned twenty-eighth from the last among thirty-seven Lords of Parliament, and immediately before Lord Lindsay of the Byres, to whom the first place among the Peers of his order is assigned in the ordinance. Lord Kellie's observation would be pertinent if the opinion embodied in the Resolution of 1875 were well-founded—but that is the question between Lord Kellie and myself.

I may also notice here, although merely for a passing observation, Lord Kellie's objection that the Earldom of Mar is not ranked earlier than 1404 in the Decreet of Ranking, whereas, according to a statement in a paper of my own which has been printed, the Earldom existed as early as 1014. I can hardly believe that this reference, and the argument founded upon it, are serious. It may be sufficient to observe that the "Annals of Ulster," in which this historical fact is recorded, were printed for the first time in 1853, and were wholly unknown to the Commissioners of 1606.

(1.) The first of the Special Objections to be dealt with—one which, if substantiated, would have the force of a catapult—

was originally alleged by the late Lord Kellie in his case and pleadings, was adopted and enforced by Lord Redesdale in his address to the Committee, and endorsed in part by Lord Chelmsford. Lord Kellie has not repeated it in his Letter to the Peers, out of a graceful respect (I presume) for the memory of his ancestor, whose character has been so rudely challenged. I subjoin Lord Chelmsford's and Lord Redesdale's development of the objection, which I have summarised *ut supra*—that “the Commissioners acted and the Decreet proceeded in ignorance of the true facts of the case affecting the Mar precedence, in consequence of Earl John having adduced evidence which, as exclusively relating to the territorial earldom or fief, did not bear upon the question of its dignity and its precedence, and of his having withheld the knowledge of historical facts, and fraudulently suppressed and subsequently destroyed documents, which facts and documents, if known to the Commissioners, would have induced them to award the precedence solely from 1565, on the same grounds upon which the House of Lords has now reported in favour of Lord Kellie.”

Lord Chelmsford said:—“This Decreet of Ranking was issued on the 5th of March 1606 (39 James VI.) . . . Under this Commission each nobleman, in order to establish his precedence, offered to the Commissioners such evidence of his title as he chose, their power being necessarily limited to the verification of the documents produced, and to forming their judgment upon them, and having no means of knowing whether anything was withheld from them which would affect the order of precedence founded upon the proof presented. Therefore their decision can carry no weight on the investigation of a claim to a title which depends upon facts not laid before them. . . . No records of the ancient dignity, and nothing prior to the charter of December 1404, were produced to the Commissioners. Isabel's charter of the 12th August seems to have been purposely kept from them. . . . During the whole of the inquiry as to the ranking of the Earl of Mar, whose claim to precedence was founded on his right of succession to the ancient dignity, but the proof of which went no further back than 1404, the Lords Commissioners seem to have been in ignorance of the charter of resignation of Alexander Stewart and his son Thomas to the King, and his regrant to them in

1426, and of the fact that the claims of the Earl of Mar to the ancient dignity had been allowed by his predecessors to remain dormant for nearly 140 years, while they had acquiesced in the Crown conferring the dignity of Earl of Mar and granting the lands connected with it, to persons no way related to the former possessors of that dignity. Had the Commissioners been furnished with this information, there can be little doubt that they would have determined the precedence of the Earl of Mar by reference to the creation of the dignity by Queen Mary."

Lord Redesdale in his speech takes a very unfavourable view of the actions of the Earl in 1606. "In support," he says, "of the opinion that at a later period the ancient peerage was held to be extinct, I would refer to the documents lodged by the Earl of Mar in 1606 for the Decreet of Ranking. These were the surrender by Isabella in 1404, and the regrant to herself and Alexander and to her heirs, and the confirmation thereof by Robert III.; a letter from that King to Sir Thomas Erskine in 1390 promising that he would not recognise any resignation of the comitatus to his prejudice" (or, I would interpose in the actual words, "of that at sho aucht to succede to as lauchful ayre"), "and the Act of Parliament of 1587 which ratified the grant of the comitatus by Queen Mary. All these documents related to the territorial Earldom only" (that is, it will be remembered, to what Lord Redesdale imagines to have been the landed estate, irrespectively of any title of dignity, which he conceives to have been always, and in the Mar case, confirmed by a distinct grant). "No records of the ancient peerage were produced, and the ranking sought was confined to whatever might have been granted in 1404, which would give a precedence of 161 years over that given by Queen Mary in 1565;" thus even in Lord Redesdale's idea, amply sufficient to refute the notion of a new creation in 1565. My observation upon Lord Chelmsford's similar criticisms applies to this also, and to Lord Redesdale's subsequent observation: "Mr. Hawkins," Lord Mar's counsel, "in answer to a question why earlier documents were not produced, said that the Earl probably produced the earliest Crown charters he could find, and that, as far as he was aware, there were no earlier documents on the Mar title, omitting to notice the Acts of Parlia-

ment at pages 591 to 597 of the Evidence, in which Donald Earl of Mar in 1283 is mentioned, and Thomas, Isabella's uncle, in 1369, public documents as accessible to the Earl on that occasion as for the present inquiry.

"The ranking sought for," Lord Redesdale proceeds, "was obtained," *i.e.* from 1404; and a necessity thereupon arose for destroying all records which would, if discovered and produced at any future period, take away that precedence. If the charter referred to in the memorandum before mentioned," a memorandum rejected by the Committee as not evidence, "granted a peerage-earldom of Mar to William Earl of Douglas and his heirs-male by Margaret, or if, as is more probable, it dealt with the comitatus in a manner adverse to its having a peerage attached to it," both alternatives being, I must observe, purely hypothetical, "it might be fatal to the ranking obtained through the production of Isabella's charter of 1404; and the destruction of the deed is thus accounted for." "If Alexander" Stewart Earl of Mar, Isabel's husband, "had obtained a grant of peerage in 1426 to himself, with remainder to his natural son," *i.e.* by one of those separate patents of which several scores have been suggested by the partisans of the heir-male during the last century, and not one has ever been discovered either in the original or on record, "or an earlier one to himself and his heirs-male or general by Isabella," that is, by a lost patent of peerage previous to the death of Isabel in 1407, emanating, of course, from the exchequer of hypothesis, "the production of either would upset the ranking obtained by means of the charter relating to the comitatus, with remainder to heirs-general," *i.e.* that of 9th December 1404, confirmed 21st January 1404-5. "Equally fatal would be a charter by Queen Mary, granting the Earldom as a new creation in 1565," *i.e.* a charter of a "peerage-earldom" distinct from the charter of comitatus, and on the assumption of the issue of which the Report proceeded in favour of Lord Kellie, which, of course, must be presumed *a fortiori* to have been destroyed. "Having obtained a ranking to which he was not entitled by the production of documents which the present inquiry has shown related to the lands of the comitatus only," *i.e.* through the application of the novelty which I have styled Lord Camden's law in 1771, "the destruction of charters

which were no longer wanted for the purposes for which they were granted, but which would be fatal to the retention of that ranking, appears a probable and almost a necessary consequence; and the memorandum relating to the charter of Robert III. affords some evidence that such destruction may have taken place;" what evidence, I confess, I do not comprehend.

My answer to all this is, in brief, as follows:—No important document bearing on the claim to precedency was withheld or suppressed, much less destroyed; and those specified by Lord Chelmsford and Lord Redesdale as withheld were not such as were admissible, even had they been offered in evidence, being null and void by the retour of service in 1565, the Act of Parliament 1587, and the judgment of the Court of Session in 1626—all of which Lord Kellie and the House of Lords have put aside, as not bearing upon the case, subordinating the Scottish law on the subject to the traditions of 1762 and 1771.

As a basis for what I have to say, I may give, in the first instance, the list of documents actually laid before the Commissioners by Earl John, as given in the most authentic form in the schedule of the entire series of evidence upon which the Commissioners settled the precedency—the schedule commonly known under the title "*De Jure Prælationis Nobilium Scotiæ*:"—

"MAR.—*Compeirit Comes de Mar. Producit ane chartour of Dame Isabel Douglass Countasse of Mar, and Alexander Stuart, sonne to the Earle of Buchan, her spouse, of the Earledome of Mar, with the castel of Keldrumie and Lordship of Garioch, the 9 of December, 1404.—Item, ane chartour of confirmation maid be King Robert the 3, confirmand the chartour above writtin, 2 Januarii 1405* " (*i.e.* 21st January 1404-5).—*Item, ane Letter made be K. Robert the 3, ta Sir Thomas Erskyne, Knight, promissand that the King should not receave ane* " ("any" in other ms. copies) "*resignatioun of the Earledome of Mar to be maid to Isabel Douglass Countesse of Mar, 22 of November anno 4ti regni Regis* " (*i.e.* 1393). "*Item, ane Act of Parliament in anno 1587, ratifeing the haill rights, tytills, and securities and provisions made of* " (to) "*Thome* " (other copies, more correctly, John) "*Earle of Mar and his predecessours, of the Earledom of Mar, as aire be progress to Dame Isabel Douglass Countess of Mar. Item, ane extract of*

ane retour of the dait the 20 of Merch 1588, quhairby Thomas” (John) “Earle of Mar is servit nerest and lafull aire to Dame Isobell Douglass, Countesse of Mar.”<sup>1</sup>

Of these documents, the first and second were the fundamental rights relied upon, showing that, on failure of heirs of Isabel’s body, the succession was destined to heirs-general or collateral. The third, the Letter of Robert III., pledged the King against the acceptance of any resignation by Isabel in prejudice of the right of these heirs collateral; the King testifying at the same time that Sir Thomas Erskine (in right of his wife) and their heirs were the “*veri hæredes*” of Isabel. The fourth document, the Act of Parliament of 1587, gave the royal and parliamentary testimony to the charter and confirmation of the Comitatus, 9th December 1404 and 21st January 1404-5, and to the charter of restitution of the Comitatus by Queen Mary, 23d June 1565, with full recognition of the fact that Robert Lord Erskine, the son and heir of Sir Thomas above mentioned, succeeded as heir to the Countess Isabel after her death, and that of her husband in 1435, and was lawfully retoured her heir under the fundamental charters Nos. 1 and 2, qualifying him in consequence Earl of Mar—Earl John in 1606 being Robert’s direct and lineal representative, as proved by the service of 5th May 1565, which preceded the charter. Lastly, the retour 20th March 1588-9—*i.e.* the general retour to the Countess Isabel, not (as previously shown) the special Retour—legally proved that his propinquity had been established, and the service retoured to Chancery, after the most exact proof had been given of the links of connection, necessarily ascending to the common ancestor, Gratney Earl of Mar, living at the close of the thirteenth century, as by the testimony of Sir Thomas Craig elsewhere given. It was impossible to exhibit a progress or claim of more precise proof than was thus laid before the Commissioners. It is objected that all these documents relate to the territorial Earldom, as Lord Redesdale styles it, *i.e.* the landed estate, and not the dignity or “peerage;”—the objection being grounded on Lord Camden’s rule of 1771. But, while the general retour 20th March 1588-9—which proves Earl John to have been lineal de-

<sup>1</sup> Carmichael’s Tracts, p. 3. [Cf. Miscellany of Maitland Club, Part II. p. 368, and Minutes of Evidence in Mar Claim, p. 442.]

scendant and next heir to Gratney, Earl of Mar in the fourteenth century, and thus, even on Lord Redesdale's view, entitled to the dignity *jure sanguinis*—must be excepted from the sweeping category of condemnation, Lord Camden's rule and the theory on which it proceeds have been sufficiently shown to be without foundation, and contradictory of Scottish law, custom, and testimony; while, if it had any foundation, neither Lord Mar (with the above exception) nor the greater number of the Peers of Scotland in 1606 had any evidence to produce as to the creation or antiquity of their dignities upon which they could claim precedence. A perusal of the evidence in the “*De Jure Prælationis*” is sufficient to show that if Lord Camden's law had then obtained, the evidence actually adduced in Earl John's behalf, and in other cases innumerable, would have been rejected by the Commissioners, and personal patents called for, whereas none such were called for, none produced; and the awards proceeded on charters dealing solely with the lands.

Such being the evidence actually produced by Earl John, and upon which the precedence was awarded to him by the Commissioners in 1606, we may now inquire what were the documents which it is alleged were withheld or suppressed, and afterwards destroyed, and which, if before the Commissioners, would have necessitated an award of precedence from 1565 exclusively. It will be well for the reader to refer back to Lord Chelmsford's and Lord Redesdale's general words here, that he may see the extent and the sanction of the charge. Lord Redesdale's words more especially were: “The ranking sought for was obtained; and a necessity thereupon arose for destroying all records which would, if discovered and produced at any future period, take away that precedence.” The documents withheld and destroyed, in terms of the present objection, were as follows:—

1. The charter mentioned in the scrap of paper found in the Douglas charter-chest, entitled, “Memorandum for (fra) the Registers,” as follows,—“Ane charter grantit to William Erle of Douglas of the Earldome of Douglas and Mar concessè.” I have spoken of this charter in a former Letter, and have shown that Lord Chelmsford and Lord Redesdale have expressed discordant views of

its import, and of the acceptability of the memorandum as evidence of the existence and nature of the charter. I need not say more as to that question. Lord Redesdale reverted to the charter when enumerating the documents which he considers to have been withheld in 1606, and destroyed afterwards, thus:—"If the charter referred to in the memorandum before-mentioned granted a peerage-earldom of Mar to William Earl of Douglas and his heirs-male by Margaret"—a superhypothesis, if such a word may be used, upon an hypothesis—"or if, as is more probable, it dealt with the Comitatus in a manner adverse to its having a peerage attached to it, it might be fatal to the ranking obtained through the production of Isabella's charter of [9th December] 1404; and the destruction of the deed is thus accounted for." I may observe upon this suggestion, that as the reference to the charter in the memorandum is not to an original document, but to the registration of that document in the Great Seal Register,—while there is no reason to believe that the roll, referred to as the hundred and second in number, was missing in 1606,—the object imputed to Earl John could only be accomplished by destruction of the roll itself, with the necessary connivance of the custodier thereof; while, if the original charter was in his possession, the suppression or destruction of that charter would be unavailing for his success, considering that it was engrossed on the Register, and the Lord Clerk Register was in attendance with that Register.

2. The charter 12th August 1404, of earlier date than that of the 9th December 1404, confirmed by Robert III.,—the charter, it will be remembered, extorted from the Countess Isabel, with limitation to Alexander's heirs, not Isabel's. Lord Redesdale does not include this charter in his category of destruction, but Lord Chelmsford speaks of it thus:—"Isabel's charter of the 12th of August seems to have been purposely kept from them" (the Commissioners). Such suppressive withholding, I may remark, would have been useless; for it is impossible to suppose that the Commissioners were ignorant

of it, inasmuch as it had been recorded by order of James III. on the Great Seal Register in 1476, where it now stands, and that Register was before them, the Lord Clerk Register being also in attendance. It was equally well known to all the numerous legal members of the commission, and to Lord Elphinstone, a layman, in particular, through the recent litigation in 1593, still pending in 1606. The Act of 1587 proceeded on the charter of 9th December 1404 and its confirmation, repudiating the charter in question. Lord Chelmsford makes no suggestion of *destruction* of deeds.

3. A charter or patent of personal peerage, a "peerage-earldom," in favour of Alexander Earl of Mar, in 1426, which Lord Redesdale suggests may have been granted to him in that year in compensation for his resignation of the "comitatus" or territory of the earldom elsewhere spoken of. "If Alexander," says Lord Redesdale, "had obtained a grant of peerage in 1426 to himself, with remainder to his natural son, or an earlier one to himself and his heirs-male or general by Isabella"—thus necessarily before the death of Isabella, which was in 1407, "the production of either would upset the ranking obtained by means of the charter relating to the comitatus with remainder to her heirs-general," *i.e.* the charter 9th December 1404. It is thus included in Lord Redesdale's category of deeds necessarily to be destroyed. I may observe that had either of these charters or patents existed, the presumption would be that they would be found in the Great Seal Register; but it is not to be expected since the days of the Norse heroes that a champion should do battle with an apparition, or rather, in the present instance, a double-headed ghost.
4. The charter of a personal earldom, assumed by the House, in accordance with Lord Mansfield's law, to have been granted before 1st August 1565, in favour of John Lord Erskine, with limitation to the heirs-male of his body exclusively, and held by Lord Redesdale to have been withheld from the Commissioners in 1606, and subsequently destroyed by Earl John. "Why that instrument is not

now forthcoming," observed Lord Redesdale, when suggesting its former existence, "I will discuss hereafter." And on coming to its place in the category of suppressed evidence, he stated: "Equally fatal would be a charter by Queen Mary, granting the earldom as a new creation in 1565. Having obtained," so the noble Lord continued and concluded, "a ranking to which he was not entitled by the production of documents which the present inquiry has shown related to the lands of the comitatus only" (thus overlooking the general retour of 1588-9), "the destruction of documents which were no longer wanted for the purposes for which they were granted, but which would be fatal to the retention of that ranking, appears a probable and almost a necessary consequence, and the memorandum relating to the charter of Robert III., *i.e.* the "Memorandum fra the Registers," "affords some evidence"—how I cannot conceive, "that such destruction may have taken place." The remarks are equally obvious in regard to the supposed patent or charter of a personal and peerage earldom *circa* 1407 or in 1426, as to the supposed patent of a peerage-earldom in 1565, that the grant of such a peerage must by Scottish law be presumed to have been with limitation to heirs-general, while the actual existing charter 23d June 1565 carried the dignity, and to "*hæredibus*" or heirs-general,—that "*de non apparentibus et de non existentibus*" is a sound principle,—that the self-same allegation of a lost patent was disallowed by the Court of Session in the Glencairn and Eglinton process and judgment of 1648, and by the House of Lords when advanced by the heir-male, Sir Robert Gordon, in the Sutherland claim in 1771,—that many must have been living (as I have elsewhere remarked) in 1606 who knew what had passed in 1565, only forty-one years previously,—and that the presumption must be, according to the general rule, that the supposed grant by charter, if made, would have been recorded either in the Great Seal or Privy Seal Register. Lord Elphinstone was especially interested in watching that Earl John's dignity should not be referred to the ancient feudal

earldom held by Isabel. There can, in fine, be no reasonable doubt that if the supposed charter or patent was granted, it must have been produced ; but, on the other hand, we know from the "*De Jure Prælationis*" that it was not produced ; and therefore the argument based on its supposed existence falls to the ground. It follows that Earl John could not suppress a document which never existed. But I am fighting with a shadow.

It is to be remembered, further, that the Lord Lyon King of Arms, who was one of the Commissioners, was officially bound to take note of all creations of new peerages, which were recorded in the books of his Court, a register which is unfortunately no longer now in existence ; and if a creation by charter of a peerage or personal earldom was in question, immediate reference would be to that officer, who could best testify to the fact—the Lord Lyon himself being, as we now know, one of the Commissioners in 1606. Again, a charter by way of patent, not conveying lands, would be recorded as matter of presumption in the Privy Seal Register. But no evidence of such patent was given either from the Books of the Lyon Office or from the Privy Seal or Great Seal Register, as proved by the schedule of what was actually adduced ; and nothing can offer stronger negative proof that none such ever existed. As already mentioned, personal creations of dignity were unknown in Scotland in 1565 ; and such a novelty constituting an epoch in the history of dignities could not have escaped notice. Further, although this was not known to the House of Lords in 1875, Lord Elphinstone, whose tenure of Kildrummie, already threatened by Earl John, rendered him beyond all others interested in preventing Earl John from obtaining a recognition of right to the ancient Earldom as heir of Isabel, was another of the Commissioners, and everything passed under his eye. There was thus a most determined antagonist watching the proceedings against any unwarranted pretensions on Earl John's part.

Lord Kellie suggests, in his Letter to the Peers, that Earl John may have received a special grant of pre-

cedence from James VI., which would account for his Earldom, although created in 1565, being ranked as it is in the Decreet of Ranking. His words are—"It is possible that this precedency was granted to Mar by a special warrant from the King; but the original dignity of Mar was certainly not ranked by the Commissioners." This warrant must have been recorded in one of the three regular registers for such acts of the Sovereign, the Great Seal Register, that of the Privy Seal, or that of the Lyon Office—the second record being the natural one. But, if so, where is the evidence of its production, and why was it not produced, in 1606? That it was not so produced is clearly shown by the silence of the "*De Jure Prælationis*." Lord Redesdale gave no countenance to this suggestion.

I have to add the further observation, that it is absolutely impossible to hold, as Lords Chelmsford, Redesdale, and Kellie maintain, that the circumstances of the Mar restoration in 1565, of the long usurpation by the Crown, of the right of Robert Earl of Mar in 1438, and of the legal status of the Erskines as the next heirs of Isabel, the "*veri hæredes*" of the Letter of Robert III. at the end of the fourteenth century, were unknown to the Commissioners of 1606, much less that they were kept in ignorance by the intrigues of Earl John. The whole question had been gone into minutely at the time of the Act of 1587, when Lord Elphinstone and others protested in Parliament, and again in 1593, in the process instituted by Earl John against Forbes of Corse, only thirteen years previously to the Decreet of Ranking. All the documents, valid and invalid, affecting the case, were before Parliament in 1587, and before the Court of Session in 1593, Earl John founding upon the legal, and his opponent on the illegal and invalid documents; so that Earl John met the Commissioners in a blaze of light such as attended the claim of no other peer whatever who stood in their presence in 1606. Lord Chelmsford's view, that the Commissioners appear to have been in ignorance of the fact that the claims of the Earl of Mar to this ancient dignity had

been allowed by his predecessors to remain dormant for nearly 130 years, while they had acquiesced in the Crown conferring the dignity of Earl of Mar, and granting the lands connected with it, to persons in no way related to the former possessors of the dignity, etc. etc., is equally negatived by these considerations.

I may add, that there is nothing in Earl John's known character to suggest or support the likelihood of his having been guilty of the turpitude imputed to him—not by his contemporaries, but by his own descendant and by two British peers in the nineteenth century.

It follows necessarily, that if no suppression of evidence took place in the case of Mar in 1606, but, on the contrary, the Commissioners, far from being in ignorance, had knowledge of all the facts and documents affecting the question before them, and if, as cannot be contested, they were fully acquainted with the law governing the interpretation of those facts and documents, and must be presumed to have applied it conscientiously and correctly, then most certainly the Commissioners were not induced through the suggested fraud to assign Earl John a place of precedency to which he was not entitled, anterior to 1565; and, conversely, they were justified in doing so. I might leave the matter here, without saying a word more—the simple fact of the earlier precedence disproving the theory of a special and personal precedence in 1565—were it not for a further, the second of these special objections, which denies that the higher precedence can afford any argument in proof that the Earldom granted to Earl John in 1565 was the ancient hereditary Earldom held by the Countess Isabel in 1404.

(2.) This special objection is urged by Lord Kellie and Lord Redesdale in the following passages of Lord Kellie's Letter to the Peers, and of Lord Redesdale's speech in 1875, and his two letters to the *Times* of 6th July 1877 and to myself of 19th May 1879.

Lord Kellie writes:—"John Earl of Mar compeared before the Commissioners of Ranking, and produced a charter, purporting to bear that Isabella Douglas was Countess of Mar in 1404; but that charter was not acknowledged by the Commissioners, who only ranked him below the Earl Marischal, whose title was created between 1455 and 1458."

Lord Redesdale, in his speech, took a different view. After founding upon the non-claim by the Erskines, and the fact of the Crown having "treated" the Earldom "as extinct by new creations" during 130 years, as "fatal blows to the claim,"—that is, to the unauthorised pretensions (as he esteems them) of the heir-general, and on the fact of an "interval of more than a month" having intervened "after the public acknowledgment by the Crown of Lord Erskine as heir to Isabella (which gave him the ancient Earldom if it was held to descend to heirs-female) before he became Earl at the time of the Queen's marriage," as "the final and conclusive blow to it,"—Lord Redesdale added, "No other Earldom but that" (the ancient Earldom) "could be in Isabella, and the Earl did not presume to contend for it in the Decreet of Ranking, but set up a fancy title, commencing with her. It was too well known in 1606," so Lord Redesdale concludes, "that the old peerage was held to be extinct in 1565 for him to attempt to get it." I find some difficulty in reconciling this theory of a "fancy title" and the accompanying observations with his statements in the second preceding paragraph, viz., that "the ranking sought was confined to whatever might have been granted in 1404, which would give a precedence of 161 years over that given by Queen Mary in 1565," and that "the ranking sought for was obtained," that is, from 1404.

Lord Redesdale's letter to the *Times* of the 6th July 1877 was a criticism upon views on the subject of the Decreet of Ranking and the Mar precedence expressed in a paper written by me, and printed in that journal on the 2d July 1877, with reference to the approaching debate in the House of Lords on the Duke of Buccleuch's Resolution, hereafter to be dealt with. After meeting my assumption "that the ancient Earldom of Mar is still in existence," by stating that "the evidence before the Committee of Privileges has been held by the House to prove the contrary," and my further assumption "that in Scottish peerage cases the presumption is in favour of heirs-female" by Lord Mansfield's *dictum*, "I take it to be settled, and well settled," etc. etc., in the Sutherland case, Lord Redesdale proceeds:—"From the death of the last heir-male in 1377 to the creation of Lord Erskine as Earl of Mar in 1565, there is no proof of any one being in Parliament as Earl

of Mar except under new creations to persons in no way descended from the old Earls. It is difficult to imagine any stronger proof of extinction. The placing of the Earl of Mar under the Decreet of Ranking is unquestionably erroneous. The date assigned to it was 1457, not 1404, as stated by Lord Crawford. It was not the date of the old Earldom, nor that of Queen Mary's creation, though nearer to the latter than the former. . . . Lord Crawford's assumption that by the Decreet of Ranking a precedence of 1404 was allowed is for the purpose of making it appear that the Commissioners on that occasion accepted the charters or surrender and regrant of the territorial Comitatus by Isabella in that year as proving that the honour went with the land,"—upon which *I* must interpose the remark that *I* had no such *arrière pensée*, but stated the precedence as Lord Redesdale had already stated it, as depending on the charters of 1404 and 1404-5, and *because* the honour *did* go with the land, as abundantly proved by Lord Hailes in his Additional Sutherland Case in 1771. "They, however," *i.e.* the Commissioners, continues Lord Redesdale, "placed the Earl of Mar after the Earl of Erroll, created in 1452; the Earl Marischal, created in 1454; and the Earl of Caithness [? Sutherland], of about the same date, giving to Mar one of 1457"—a passage on which *I* must observe that there is no authority for any of these dates—they are approximative only, the precise dates of creation being unknown, except in the case of Erroll in 1452; and that rests solely on the authority of the Auchinleck Chronicle, a most valuable and authentic contemporary MS., which, nevertheless, the House of Lords rejected as evidence in the Annandale claim in 1876, a rejection which, it might be urged, were it of the slightest consequence, incapacitates Lord Redesdale from founding upon it. "In refusing to recognise the peerage," continues Lord Redesdale, "as being connected with the territorial Comitatus in the person of Isabella, who was the heir of the last Earl of male descent, they" (the Commissioners of Ranking) "must be held to have considered the ancient Earldom to have been extinct. It is impossible to imagine on what grounds they gave the precedence of 1457, when certainly there was not any Earl of Mar in existence. If they had had the evidence before them which was before the Committee of Privileges, they must have come to the conclusion adopted by

the House in 1875. It was proved by that evidence that Lord Erskine sat as such on the Queen's Council in 1565 on the 25th of July, and on the 1st of August sat as Earl of Mar. The restoration of the territorial Comitatus to him as heir to Isabella was on the 23d of June, more than a month before he became Earl. That the ancient Earldom was not restored to him was shown by his sitting at subsequent Councils as junior Earl." Lord Redesdale overlooks the fact that before the Decreet of Ranking there was, as a rule, no settled precedence; and in the records of Parliament each Lord was put down as he came in. "Further proof that he was created at that time, on the occasion of the Queen's marriage to Darnley, is found in a letter from Thomas Randolph, the agent in Scotland of Queen Elizabeth, to the Earl of Leicester, dated the last day of July 1565, giving an account of all that occurred at the marriage, in which he says, 'to honour the feast the Lord Erskine was made Earl of Mar;'" Lord Redesdale forgetting here, as he did in his speech in the Committee of Privileges, that this letter of Randolph had been rejected as evidence by the Committee. I have no quarrel with the accuracy of Randolph's statement, understood in its true contemporary sense; "made Earl of Mar," being simply, in the technical language of the time, "inaugurated Earl of Mar," that is, on the arrival of the instrument of infeftment or seisin upon the charter of 23d June 1565 from Aberdeenshire, as formerly explained, previously to which he could not take the title of Earl according to feudal usage. "With this evidence before the Committee, it was impossible to come to any other conclusion than that expressed by the Lord Chancellor, who said in giving his judgment: 'I am of opinion that it is clearly made out that the title of Mar which now exists was created by Queen Mary somewhere between the 28th of July and the 1st of August in the year 1565. It appears to me perfectly obvious from every part of the evidence before us, that in the greater part of the month of July and before that creation there was no title of Mar in existence.'"

The views in this Letter with respect to the Decreet of Ranking are expanded and enforced in a letter which I have since received from Lord Redesdale, written on the occasion of my second or Additional Protest, and in which he offers an

explanation (thus supplementing the letter to the *Times*) of the ranking of the Earldom of Mar as from 1457—the date which he has now adopted in lieu of 1404, as expressed in his speech in Committee. I ventured to request Lord Redesdale to permit me to defer replying to his strictures till I should be able to do so in connection with this present reply to Lord Kellie; and he very courteously acceded to this proposition. The bases upon which Lord Redesdale and I myself respectively stand are, in fact, so diametrically opposed that no reply to this interesting letter would be possible without clearing the ground by the long process of proof, which I have laid before the reader in the preceding pages. The Letter—which, with that to the *Times*, completes the sum of objection to the Decreet of Ranking in its special relation to the Earldom of Mar, upon which I stand challenged by Lord Kellie—is as follows; and I shall trust to the memory of the reader to supply those running comments on the successive statements which I myself am unwilling to make in the case of a letter addressed personally to myself, grave in its remonstrance, and written by a man whom I so sincerely respect on public grounds, and from whom I regret so much to differ on private and friendly considerations:—

“PARK PLACE,  
“ST. JAMES’S, *May 19th*, 1879.

“DEAR LORD CRAWFORD,—I have just seen your protest against Lord Mar’s vote at the last election of a Representative Peer. Having given a detailed judgment in the Committee of Privileges on the case, I request your consideration of the following observations on your statements.

“The origin of the ancient Earldom of Mar is lost in its antiquity. There is no record of its creation.

“You state the law to be in such cases as follows:—

“‘The rule and presumption of succession in Scottish law is in favour of the heir-general, alike in lands and dignities, where no counter right can be shown by legal evidence in favour of the heir-male.’

“The Earl of Mansfield in the Sutherland Case thus declared the law in regard to dignities:—

“‘I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir-male, always open to be contradicted by the heir-female upon evidence to the contrary. The presumption in favour of the heir-male has its foundation in law and in truth.’

“You will excuse me for saying that I consider Lord Mansfield’s opinion on such a point of greater authority than yours.

“The last male heir of the ancient Earldom of Mar died in 1377.

“Since that date no person has ever been acknowledged in Parliament either before or since the Union as holding the ancient Earldom. This experience of more than five centuries affords conclusive proof that it is extinct in accordance with the law as laid down by Lord Mansfield.

“Between the death of the last heir-male and the creation of Lord Erskine in 1565, at least three Earls of Mar were created, proving that during that period the ancient Earldom was held to be extinct.

“You contend that John Earl of Mar was held by the Commissioners for the Decreet of Ranking to possess the ancient Earldom, thus stating his case :—

“ ‘ In virtue of the documents produced by him (*i.e.* the charter of Isabella in 1404, and retours by which he was served her nearest lawful heir), the Earl of Mar was placed on the Roll immediately after the Earl of Sutherland and before the Earl of Rothes, the Commissioners thus assigning him the date of the charter of 1404 as his proper place of precedence. The ranking of the Earl of Mar in the Decreet of Ranking cannot now be challenged in any Court of the United Kingdom.’

“I am surprised at your making such a statement, which I will show by the clearest evidence to be incorrect.

“The Commissioners did not give the Earl of Mar the precedence of 1404. You are right as to his having been placed before the Earl of Rothes (created in 1458). Your statement that he was placed next below the Earl of Sutherland is misleading. That Earldom did not in the Decreet of Ranking hold the high precedence allowed to it by the House of Lords in 1771. Both it and the Earldom of Mar were placed below the Earldom of Erroll (created in 1452). I defy you to deny this. How then can you hold that the Commissioners gave the Earl of Mar the precedence of 1404? Surely you must know that in all Scotch Peerage lists the date allowed to it has been 1457.

“There can be no doubt that Lord Mar endeavoured to obtain a report from the Commissioners in favour of his claim to the ancient Earldom, and it is equally clear that they declined to do anything that could be held to support it. Refusing to give him a precedence founded on Isabella’s charter of 1404, they thereby declared that they considered that the ancient Earldom became extinct on the death of her grandfather, the last heir-male, and that she had not inherited the peerage-earldom with the territorial comitatus dealt with in that charter. It is absurd to say that in allowing a precedence of 1457, they acknowledged the existence of the ancient Earldom. I hold that the selection of that precedence was to prevent any such assumption.

They took that date because there was then an Earl of Mar in Parliament; James the Second having before that period so created his third son, who died without issue in 1479. Thus they connected the precedence they gave Lord Mar with an Earldom, to which no Erskine could at any future time make out a claim, and as that peerage was extinct no one was injured by their so connecting it. If they had taken a date when there was no Earl of Mar in Parliament, they might have been held to admit that he had a claim to a dormant title, which could only have been the ancient Earldom. By allowing him the precedence of 1457, they made him a worthless, because unfounded grant in no way connected with the ancient Earldom, and this decision of the House of Lords has declared this.

“I shall be much obliged to you for a reply to these observations.—Believe me, my dear Lord Crawford, yours very sincerely,

“REDESDALE.”

The gist of this objection appears to lie in the fact that Mar was placed (with Sutherland immediately above him) below Erroll and Marischal; and as those earldoms were created about the middle of the fifteenth century, the Earldom of Mar recognised by the Commissioners of 1606 could not, it is inferred, have been that which depended upon the charter 9th December 1404 and its confirmation; and thus the argument for the continuity of the ancient earldom, as restored in 1565, falls to the ground, and the Report of the Committee for Privileges is justified.

Placed thus on my defence—what I am called upon to vindicate being my assertion that the precedence awarded to the Earldom of Mar was from 1404, with the inferences therefrom in favour of the heir-general—I must be allowed to remind the reader, in the first instance, that I stand upon Scottish law, with the principles and precedents of centuries behind me, and practically not in 1879 but in 1606, as the contemporary of the Commissioners and advocates of that year, whose cause I have to plead against this retrospective attack by men removed nearly three hundred years from the time and scene of action, and interpreting the conduct of those who took part in it by rules and principles absolutely unknown then, and which have grown up like mushrooms in a part of the United Kingdom which was then, and is still in point of law, a foreign country. I refer here particularly to the assertion that the documents produced before the Commissioners related

merely to the Comitatus or fief of Mar, as distinguished from the dignity or title of honour, and thus could carry no weight in the judgment of the Commissioners towards determination of the precedency, or in support of the argument founded on that precedency. This assertion depends entirely on Lord Camden's rule, acted on in the Cassillis claim and enunciated in 1771, which is a pure figment of the legal imagination. In the same sense I protest against the assumption that the decret of the Court of Session in 1626 is immaterial to the question, as dealing only with the comital fief—an idea which could only have originated in the mind of a lawyer of the eighteenth century. The decret of 1626 puts the stamp of the law, as has been already abundantly shown, on the whole series of documents and transactions, legal and illegal, from 1404 downwards, fixing the point, *inter alia*, that Sir Robert Erskine, Earl John's lineal ancestor, became Earl of Mar in 1435 as heir of the Countess Isabel, a fact which dominates the interpretation of the evidence adduced before the Commissioners in 1606, accounts for the exclusion of the evidence alleged by Lords Chelmsford and Redesdale to have been withheld, and determines the question of precedency, as deriving from 1565 only, or from an earlier date. Had the doubt suggested been between 1435 and 1404,—had Lord Kellie or Lord Redesdale asserted the former date to be correct and the latter wrong, I should have replied—If you think that the precedency should be taken from the actual year of the succession of the Erskine dynasty instead of from the date of the investiture which reserved their prospective right, I will not contest the possibility of it. But there is a world of difference between either 1404 or 1435 and 1457; and I shall now show that I was not in error in fixing upon the earlier date; although I may be allowed to say that, whether the precedency awarded was from 1404, or 1435, or 1457, I cannot see how this can in the slightest degree affect the argument in favour of Earl John's inheritance of the earldom held by Isabel, both fief and dignity, and against the theory of a new creation in 1565. It must be recollected, moreover, that the Act of Parliament 29th July 1587 had solemnly recognised the descent of John Earl of Mar from Robert Earl of Mar, the successor of Isabel in the dignity after the death of her

husband Alexander Stewart in 1435; and that with this Act before the eyes of the Commissioners, and the relative documents, it is impossible to suppose that they could have postponed Mar to Erroll and Marischal, and, I may here add, to Argyle—on the ground of his dignity not being derived from the Countess Isabel and from 1404, but from a period not anterior to 1457.

A preliminary question, suggested rather than positively asked by Lords Chelmsford and Redesdale, may be here answered, viz., Why, if the Earldom of 1565 was the ancient Earldom inherited by Isabel from her ancestors, did not Earl John adduce evidence of his descent from the ancient Earls, and claim a higher precedence than from 1404? The reply is, that, in the first place, he had actually proved his descent from the common ancestor of Isabel and himself, viz., Gratney Earl of Mar, by the evidence upon which the retour of 1588-9 proceeded, which retour was before the Commissioners, legal evidence of the descent in question, independently of any necessity for reiterating the proof produced in 1588-9, and to the sufficiency of which Sir Thomas Craig bears such marked testimony; and secondly, that his not having claimed a higher precedency is no proof that he was not entitled to claim such,—an argument which Lord Redesdale himself employed in the Montrose claim in 1853 with reference to the designation of the Earl of Glencairn by his lower style of Lord Kilmaurs—at a time when Lord Redesdale's was the only voice raised from time to time in the Committee for Privileges in support of the argument of truth.

But I suspect that a further bar existed to his claim for a precedency higher than 1404, or perhaps 1435, respecting which I shall speak presently. Some consideration may be attached also to Earl John's known moderation and good sense (as evinced throughout his life), which might naturally suggest that extreme pretensions might create prejudice against him, and excite hostility among his brother peers, while under no circumstances could he (at that time, at least) have obtained the first seat among the Earls, that being already pre-occupied by another family under sanctions which the Commissioners in 1606 were bound to respect, and did respect. It was not, in fact, till after the creation of the Earl of Angus as Marquess

of Douglas, in 1633, that, as we shall see,—not Earl John, but Earl John's son, claimed a higher precedence than that awarded in the Decreet. The date of the ruling infestment of 1404, under which Sir Robert Erskine became Earl of Mar in 1435, and his descendant John Lord Erskine was restored to the Earldom in 1565, offered a natural standing-point for the precedence as affirmed in 1606.

I come now to the point of the present objection, viz., that the postponement in the Decreet of Ranking of the Earldom of Mar to the Earldoms of Erroll and Marischal, the former created (according to the Auchinleck Chronicle) in 1452, the latter at some period between 1455 and 1458, supplies a contradiction to my view of a precedence from 1404, and the inference therefrom, which I cannot surmount—a contradiction fatal to the suggestion of the Earldom of 1565 being the ancient Earldom. But the noble and learned Lords take no notice of the similar discrepancy apparent on the face of the Decreet, that Argyle, whose creation as Earl dates from 1456-7, is preferred to Crawford, whose creation as Earl took place, on equally certain testimony, in 1398. The argument of my noble antagonists would prove on the same reasoning that the the Earldom of Crawford must have been created subsequently to that of Argyle. All these difficulties are superficial only, and disappear when we appreciate the principles upon which the dignities which came before the Commissioners in 1606 behoved to be classed, and the order of precedence *and priority* adjusted. Lord Kellie and Lord Redesdale, applying to precedence the rough and ready measure of mere antiquity of creation familiar to the nineteenth century, take no notice of the complexities arising from the peculiar forms and privileges existing in the sixteenth and preceding centuries, and which must be counted and made allowance for before we can properly estimate the principles upon which the ranking proceeded in the Decreet of 1606. No one familiar with the times will suppose that what I have called the rough and ready process, which the more philosophic and conciliatory temper of a modern age has acquiesced in, could be adopted and carried through in the presence of the feelings which animated the Scottish nobles in 1606, without due consideration for the privileges I have referred to; and the general acquiescence

with which the awards were received at the time is a sufficient proof that the Commissioners acted with wisdom as well as knowledge in performing the difficult and delicate task intrusted to them. At the same time, I must say, that I am aware of no instance in which justice was sacrificed to expediency in their action unless it be in fixing the precedence of Mar as from 1404, and not from the date of the common ancestor of Earl John and Isabel, or even earlier. At the same time, there may have been a controlling principle in this case also, as I have already suggested.

The principles I thus lay stress upon are as follows:—

The general rule laid down was, no doubt, that precedence should be awarded according to the earliest proof of antiquity that could be adduced by the peers from their charter-chests; or, when such was not supplied by themselves, from the Great Seal Register or other public records through the Lord Clerk Register, who was clerk or secretary, moreover, to the Commission, and with the advantage of the testimony of the Lord Lyon, who was one of the Commissioners. But there were special exceptions—one special exception, at least, of ancient date—in which precedence was awarded, or, rather, recognised and taken for granted, over the heads of other peers. A further exception existed in the case of peers holding great hereditary public offices, which were understood to confer precedence more or less, over other peers. My belief is that ceremonial privileges long exercised, although apart from any hereditary office, were further recognised as giving a prescriptive right to priority of place. This much stated, I shall illustrate the operation of these principles, and, at the same time, vindicate my statement that the precedence of Mar was settled as from 1404 and not 1457, by a criticism of the places assigned by the Decreet to the first seven of the Earls, viz., Angus, Argyle, Crawford, Erroll, Marischal, Sutherland, and Mar.

1. *Angus*.—Of this Earl it is said, he “comepeirit not;” but a charter was found in the Great Seal Register, by which it appeared that his ancestor was Earl of Angus on the 9th November 1398. Sutherland appeared and produced a charter proving that William Earl of Sutherland was Earl in 1347, which would have given him the higher place. But by an ancient grant of uncertain date and not on record, recognised how-

ever by James VI. in 1599, and confirmed by a charter under the Great Seal in 1602, the first place and vote in Parliament had been granted to the Earls of Angus; and the right thus vested in his house was formally resigned by William eleventh Earl of Angus to Charles I. on the 14th June 1633, in consideration of advancement to the rank of Marquess of Douglas. When dukes and marquesses were introduced into Scotland the question had arisen, whether the grant of precedence and first vote over all the peers in the person of the Earl of Angus could give the precedence over those of higher rank; and Sir John Skene, then Lord Clerk Register (afterwards one of the Commissioners of 1606), gave it as his opinion, being consulted by the family on the general case, whether a duke or marquess may first sit and vote in Council, Convention, and Parliament before an earl who is specially infeft by his Majesty in the first place and vote of Parliament, Council, and Convention," as follows—"The answer is *negative*, especially if the Earl have an authentic charter to that effect of the Sovereign Prince, and have been possessed therein, by himself and his forbears (ancestors) of a long time drawn to a prescription of years,"—Sir John here, as observed by Mr. Riddell, admitting prescription in peerage precedences. But Angus either limited his claim to be first of the earls, or that rank only was allowed him by the Commissioners. Independently of this priority of vote, and closely connected with the position of first Peer of the realm (as we should now say, below the royal family), the right of bearing the Crown, the first of the three "honours," or *insignia* of Scottish royalty, was vested hereditarily in the Earls of Angus, and always exercised when they were present on great ceremonial occasions; or, if an exception took place, as when the Duke of Lennox bore the Crown in the riding or procession to Parliament in June 1592, the Earl protested in defence of his right in Parliament, to which the King replied that the act should not be prejudicial "to the said Earl, his rights, privileges, and honours" which he and his ancestors had to the "first place in first sitting and voting in all Parliaments, etc.; first place and leading of vanguard in battles, and bearing the Crown." All this was familiar to the Commissioners in 1606, and was evidently acted upon in assigning the precedence to Angus as first of the Earls, although they subordinated him to the Duke of

Lennox and the then two Marquesses of Scotland, Hamilton and Huntly; and this in the presence of, and it may be presumed in overruling of the opinion of Sir John Skene above noticed; in which I cannot doubt that they were right. The ranking awarded was thus, for the reasons assigned, exceptional to the strict rule of priority of creation, both Sutherland and Mar being older. The reader has already observed that the words "precedency and priority" are used in the Decree, not, as I apprehend, tautologically, but in order to distinguish precedency from relative antiquity from priority of place grounded on exceptions such as that just signalled.

2. *Argyle*.—The Earl made no compearance in 1606. This Earldom dated, as has been stated, from 1457. Crawford proved the existence of his Earldom in 1398; Sutherland in 1347; and Mar (*pace* Lord Redesdale) in 1404. Sutherland and Crawford ought to have had precedence over Argyle by the ordinary rule. But Argyle held the great hereditary office of Master of the Household and Justiciary-General, the highest, with the exception of the High Stewardship, which had been vested in the Crown after the accession of the Stewarts to the throne. Moreover, the Earls of Argyle, probably from this cause, had been wont to bear the sceptre, the second of the "honours," at the ridings of the Scottish Parliament, and on all ceremonial occasions, thus inferring, as I conceive, a prescriptive right of ceremonial precedence. Argyle was thus ranked second to Angus, and immediately above Crawford, although the latter was chronologically fifty-nine years his senior. No protest was ever made by any Earl of Crawford against Argyle's anteriority of precedence. It was first called in question by Sutherland in 1691.

3. *Crawford*.—David Earl of Crawford appeared by his procurator, and produced a charter thus described in the "*De Jure Prælationis*:"—"Ane infeftment given be the King Robert dilecto fratri suo Davidi de Lindsay Comiti de Crawford of the barony of Craford cum quatuor punctis coronae et in liberam regalitatem 10 Decembris anno nono regni ejus," *i.e.* 1398, "in rotulo cartarum Roberti 3<sup>i</sup>, 13." Sutherland, producing proof from 1347, ought to have had the precedence on the strict rule of antiquity of creation; but Crawford was preferred. There is more difficulty in accounting for this priority

than in the other cases before us. There was no great hereditary public office in the house of Crawford, such as that of High Justiciary, Constable, or Marshal. Mr. Riddell, who indicated the rankings of Angus and Argyle on the ground of the exceptions above indicated, looked upon the ranking of Crawford as an anomaly; and it was protested against and attempted to be reduced by Sutherland, as is well known, subsequently to the Restoration. But, to use Mr. Riddell's favourite proverb, one swallow does not (under any circumstances) make a spring; and, on the contrary, the presumption must be that the Commissioners acted on some sound and recognised principle in assigning Crawford the precedence above Sutherland and Mar, precisely as they unquestionably did in assigning precedence to Argyle above Crawford. There are reasons which, to my own mind at least, account for the preference shown in his favour. I may clear the ground, in the first place (in the presence of recent imputations, and without any disrespect to the memory of the Commissioners), by observing that the precedency granted was not owing to any exceptional influence exerted either by Crawford himself or on his behalf; for the then Earl of Crawford (not my lineal ancestor) is known in family histories as the "Prodigal Earl," or "comes incarcerationatus," having been imprisoned for life in Edinburgh Castle at the instance of his next of kin, the heirs to the succession, as the result of a family council, in order to prevent his dilapidating the Comitatus by alienation of its dependencies and revenues—detained, be it understood, not as a criminal, nor as a debtor, nor as a lunatic, but as a spender and waster to the injury of contingent interests, executing the regular deeds and instruments incidental to his tenure of the fiefs, but otherwise not a free agent. Two considerations may have been influential with the Commissioners in 1606 towards assigning precedency to the Earldom of Crawford below Argyle, the High Justiciary, but above Sutherland and Mar. I merely suggest these considerations, without affirming them. The one is the fact that the Earls of Crawford appear from time to time as carrying the sword, the third of the "honours," in full ceremonies, ridings of the Parliament, or the like, in such manner as to induce the impression that while Angus bore the crown and Argyle the sceptre, the first by hereditary

privilege, the second by ceremonial right, whenever present, Crawford had a preference before others to bear the sword, or, in the absence of those entitled to prior dignity, the sceptre, or even the crown. At the riding of Parliament, for example, in 1565, Crawford bore the sword,—Lord Gordon, as representing his father Huntly, the Chancellor, bearing the crown, and Bothwell, then in the zenith of his power, the sceptre; while, to say nothing of Morton, the Earl Marischal, Athole, Lennox, and others, Sutherland was present, who, in point of mere antiquity, would have enjoyed the privilege in his stead. The Earls of Sutherland had never attended the Parliament since the days of Robert Bruce till late in the fifteenth century; and this may possibly have induced a prescriptive right of priority against him in such ceremonials in favour of Crawford, which would have had weight given to it by the Commissioners in 1606. The second consideration here suggested is grounded on my strong persuasion (whatever its worth may be) that a knowledge or belief that the Earls of Crawford were rightly entitled to the Dukedom of Montrose, created in 1488, may have influenced the preference to the effect of placing Crawford as high in the list of Earls as possible, consistently with the special privilege of Angus and the prestige from the office of High Justiciary vested in Argyle. It is to be observed that the productions in favour of the Earls are followed in the “*De Jure Prælationis*,” or schedule of evidence, by notices of the creations of the Dukedoms of Albany, Orkney, Lennox, and Montrose, the latter under the original charter by James III., 18th May 1488, while that of Ross, created in January 1487-8, is omitted,—a significant circumstance. These notices precede the proofs for the “Lords;” and it is clear that they formed part of the evidence doubtless produced by the Lord Clerk Register or Lyon, for the guidance of the Commissioners. There is no intimation of any revocation or limitation of the Dukedom of Montrose for life; whereas the Dukedom of Ross, which became practically extinguished by the entrance of the Duke into holy orders is, as I have stated, omitted. It was not till the great struggle for precedency between the Earls of Glencairn and Eglinton in 1637-1648 that Eglinton, whose interest it was to fortify the effect of the celebrated Act Rescissory, alleged that that Act had cut down the original Montrose charter, in

order to prove that it had also cut down the original charter of the Earldom of Glencairn—which however the Court of Session decided by their judgment in 1648 had not been so cut down, but was valid, and gave Glencairn the precedency which he now holds. But to the Commissioners of 1606 it must have been apparent, if their attention was directed to the question—and Crawford appeared by his procurator, though not in person—that the Act Rescissory was simply an act of revocation analogous to those with which they were perfectly familiar, passed at the accession or majority of each successive Sovereign for the purpose of reclaiming to the Crown the annexed properties of the Crown which might have been granted away by the king's predecessors or during his own minority—the series of alienated subjects reclaimed or declared null by the Act Rescissory of 1488, being enumerated in precisely the same order as in the sister Acts; while the final clause, “creation of new dignities,” under which it was maintained by Eglinton in 1488, and held by the House of Lords in 1853, that the personal dignity of Duke of Montrose was annulled, related merely to the concession of regalities, which, as being prejudicial to the power and privilege of the Sovereign, had been prohibited by Act of Parliament in 1493, unless with consent of Parliament. The Dukedom of Montrose, created by James III., as already stated, at the crisis of his fate—in strict parallelism, as I have also shown, with the Marquesate of Montrose, granted by Charles I. in 1647—was founded upon a transmutation or conversion of the Earldom of Crawford into the Dukedom of Montrose, with the addition of certain fiefs and revenue customs which were annexed property of the Crown, in full and free regality—the consent or confirmation of Parliament not having been obtained to the alienation, although the King doubtless expected to be able to obtain it thereafter. The Act Rescissory, as was abundantly proved in 1853, never took effect on these illegal concessions; but by a later enactment, they were effectually reclaimed, and then regranted to the Duke for life, with consent of Parliament, but in full recognition of the title of dignity, inasmuch as he was created Duke of Montrose *de novo* by a special Act of the King, James IV., with advice of Parliament, on the preceding day, the 18th September 1489, but not proceeding on any resignation of the original

dignity, which could alone have denuded him thereof; and without the slightest limitation on the descent of the dignity, the object of the regrant being expressly to perpetuate the descent of the Earldom, transmuted into a Dukedom, with its hereditary estates, constituting the Comitatus of Crawford, but without the fiefs, rights, and privileges which have been reclaimed to the Crown as granted without consent of Parliament, and thus without legal warrant *ab initio*;—which nevertheless they allowed him for his lifetime, as said is. The reasons why it was inexpedient and practically impossible for the Duke's son and his heirs to assume the dignity after the Duke's death have been shown elsewhere; but the original grant in 1488 stood on the Great Seal Register, the grant *de novo* on the Books of Parliament, and the grant of the fiefs for life (in a very abbreviated form) by a memorandum interpolated, but contemporaneously so, in the Great Seal Register, all of which were in the hands of the Lord Clerk Register and before the Commissioners of 1606, while the original grant was brought specially before them among the productions as evidence, as above shown. I think that it is not at all improbable that this dormant right weighed with the Commissioners in settling Crawford's precedency as high on the roll as possible, next to Angus and Argyle. But this is not all. As I have remarked, in the case of the registration of the arms of "Erskine umquhile Earl of Mar," in the Armorial drawn up by Sir David Lindsay of the Mount in 1542, that that amounted to an official recognition of the Earldom of Mar as having been lawfully in Robert Earl of Mar as the heir of the Countess Isabel in 1438, although the Erskines were subsequently deprived of it by the action of the Crown and otherwise, thus rendering Robert practically the "umquhile" or late Earl; so the fact that the coat of "Lindsay Duke of Montrose" is blazoned in the same Armorial among the Dukes, but without any qualification of "umquhile," notwithstanding the non-assumption by later Lindsays, the Duke's successors, equally shows that in the opinion of that great official, the highest authority in Scottish heraldry, the Earl of Crawford in 1542, and necessarily in 1606, was legally Duke of Montrose, and thus entitled to a higher dignity than that of Earl. The Lord Lyon King, actually present as one of the Commissioners,

was the nephew and namesake of the Sir David Lindsay of 1542, and the heir of his traditions; and his voice would naturally be to the same effect. Both the preceding considerations, the ceremonial privilege and the dormant and latent right to a higher dignity, the highest in Scotland, may, I think, be suggested with considerable force as an explanation of Crawford's precedence above Sutherland, although the Crawford charter is only of 1398, and that of Sutherland of 1347. Lord Selborne and Lord Kellie have suggested that Earl John may have enjoyed a precedence above 1565 by a special grant of James VI.; and the suggestion would be equally available in vindication of Crawford's precedence above Sutherland. But in both cases the grants would have been on record, or at least testified to in some manner or other, as in the case of Angus; whereas neither in the case of Mar nor Crawford is there the slightest intimation of such. It is a wholly modern hypothesis. In fine, as I observed at the commencement, the presumption is in favour of the Commissioners having assigned the third place among the Earls to Crawford on some sufficient consideration, as in the other six cases we have now been dealing with, and the *onus* lies on our opponent to prove the contrary. If wrong, it would be the exception that proves the rule.

4. *Erroll*.—Erroll, the hereditary Lord High Constable of Scotland, and *ex officio* one of the Commissioners, produced evidence from which it was shown that his ancestor William Lord Hay, the High Constable, must have been created an Earl between 1451 and 1455. The actual year of creation was, according to the contemporary "Auchinleck Chronicle" (our best authority for the events of the time), 1452. The great office of Constable had been hereditary in the family of De la Haye, or Hay, from the days of King Robert Bruce, and it is still held by their present representative. It had long been recognised that the office of Constable gave the Earl of Erroll a certain precedence above the date of his Earldom; and in 1585 a fierce contention took place in Parliament between Francis Stewart, Earl of Bothwell, who held the hereditary office of High Admiral, and Erroll as Lord High Constable; Erroll protesting that in the days of the Regent Mary of Guise, the Constable and Admiral had contended "for the prioritie of thair

voit and place in Parliament, . . . at the quhilk tyme it wes concludit that the Constable sould first voit in Parliament notwithstanding that he satt not amang the rest of the erllis, bot for doing of his office in Parliament satt laich (low) down in the Parliament Hous; and thairfoir, except the Kingis Majestie and Estaittes restorit him to the ancient degrie and prioritie in voiting quhilk his predecessoris had, refusit to voit in this present Parliament.”<sup>1</sup> Erroll’s office in Parliament as Constable was, as Mr. Riddell remarks, to keep order within the walls of Parliament, as the office of the Earl Marischal was to keep order without the walls; and this accounted for the particular seat occupied by Erroll “laich down” in the hall of assembly of Parliament. As between Sutherland producing evidence from 1347 and Mar from 1404, both Sutherland and Mar would have been entitled to precedency over Erroll, an Earl only from 1452; but the precedency, or rather, in strict language, the “priority” was conceded to Erroll, evidently in consideration of his office.

5. *Marischal*.—The Earl Marischal, one of the Commissioners *ex officio*, like Erroll, produced nothing on his own behalf in proof of his creation as Earl; but proof was produced “*ex registro*” by the Clerk Register that his ancestor, “Robertus Marischallus Scotiæ, miles,” so designated in 1426, appears as “dominus de Keith” in 1451, and “comes Marischallus” in 1458. The office of Marischal, or Marshal, was next in grade to that of Constable. “The Court of Session,” says Mr. Riddell, “the second day of February 1682, decided that the hereditary office of Marshal was of the nature of a peerage, and not *in commercio*.”<sup>2</sup> Sutherland and Mar were of earlier creation as Earls, and would thus have been entitled to higher precedence; but the high hereditary office held by the Earl Marischal was understood, as in the case of Erroll, to determine “priority” in his favour. I may observe here that the fact that Crawford was interposed between the High Justiciary as above and the Lord High Constable and the Earl Marischal below him constitutes a further reason for belief that some special considerations such as those I have above suggested must have existed for determining that high “priority” in his favour.

<sup>1</sup> Acts of the Parliaments of Scotland, iii. 375.

<sup>2</sup> Riddell’s Peerage and Consistorial Law, p. 24.

6. *Sutherland*.—The Earl of Sutherland appeared and produced the well-known charter of David II. to William Earl of Sutherland and Margaret his wife, the King's sister, "of the barony of Cluny lyand within the shirreffdom of Aberdeen, 4 of November, the 17 year of the reign of the said King," *i.e.* 1347,—proving that his ancestor was Earl in that year. This would have given him the first place over all the Earls previously mentioned, but for the special causes already stated, there being neither great hereditary office nor ceremonial prescription to weigh in his favour. Lastly, with respect to—

7. *Mar*.—John Earl of Mar produced the evidence already noticed, commencing with the charter in favour of Isabel Countess of Mar and Garioch 9th December 1404, and ending with "ane extract of the retoures of the date 20 Martii 1588" (*i.e.* 1588-9), "whereby John Earl of Mar is served neirest and lawful aire to the said Dame Isobel Douglas, Countess of Mar." He was ranked second to Sutherland in consideration of the earlier date, 1347, proved by Sutherland,—he was postponed to the Earls already mentioned for the same causes as Sutherland. Lord Kellie suggests that "the Commissioners may have ranked Sutherland according to a supposed new creation which has since been declared not to have taken place," *i.e.* in 1513, when Sir Robert Gordon in 1771 contended that Adam Gordon, husband of Elizabeth Countess of Sutherland in her own right, must have been created Earl of Sutherland by a lost charter, the presumption as to which was in favour of heirs-male. But this is negatived by the fact that the precedence awarded dates, even by Lord Kellie's and Lord Redesdale's admission, from long before 1513.

The result of this enumeration tends, I think, to prove that the ranking of the first seven Earls on the Decreet of Ranking, including the Earldom of Mar, proceeded upon well-ascertained and connected principles,—Angus standing first under an ancient grant and privilege—Argyle second, as hereditary Lord High Justiciary—Crawford third; I will not venture to affirm more than presumably on good grounds, inasmuch as all the others stand so—Erroll fourth, as hereditary Constable, and Marischal fifth, as hereditary Marischal; these five holding evidently exceptional positions of "priority" totally independent of mere precedence through antiquity of creation. Next

to these five privileged dignities we have a new category, in which the ranking depended on the simple and unquestionable plea of antiquity as proved by evidence produced—Sutherland holding the first rank in this category, claiming from 1347, and receiving precedence accordingly—then Mar, seventh on the list, and second in the same boat with Sutherland, claiming from 1404, and receiving place accordingly. Next to Mar would have come Menteith, with a precedency from 1427, but he only adduced proof from 1466; and Rothes therefore received precedence in virtue of proof bearing date 1459. Following upon these come Eglinton, Montrose, Cassillis, and Caithness, all four preferred over Glencairn through no fault (as has been shown) of the Commissioners; and after them Buchan, the neglect of whose custodiers, the tenant being an heiress, equally occasioned misplacement, although to be rectified by the Court of Session in 1628, as the Glencairn misplacement was in 1648. A space of above fifty years then elapses, during which no creation of an Earldom had survived down to 1606. But I need not travel further down the list.

What I have proved may be sufficient to vindicate my assertion that the Mar precedency is from 1404 in the Decreet of Ranking, and to dispel the discredit sought to be attached to the Decreet as an “imperfect” and “erroneous” document so far as the leading seven Earls are concerned. The argument in my Protest, therefore, I submit holds good, that, if the Mar precedency stands from 1404, the dignity upon which it is founded could not possibly be the new and personal dignity affirmed by the House of Lords to have been created in 1565, not by the existing charter of restitution of the Comitatus, but by a lost charter or patent. If this last was the case, why was it not produced? Why is it not in the “*De Jure Prælationis*”? I do not think Lord Redesdale’s theory of its having been withheld in 1606, and destroyed subsequently, affords an answer to this question.

With respect to Lord Redesdale’s assertion in his letter to myself that the Commissioners placed John Earl of Mar in the place of an Earl of Mar not of the Erskine blood, but necessarily one of the princes, younger sons of the Scottish Kings, who sat in Parliament in 1457, and this with the view of excluding any idea of a connection between the Earldom of 1565

and the ancient feudal Earldom, I have to reply that the Earl of Mar who, Lord Redesdale says, was so created by James II. before 1457, and who sat in Parliament in that year, was, as he also states, John Stewart, James II.'s third son, who died without issue in 1479. In his speech in Committee, Lord Redesdale fixes the date of the creation in 1460, his authority being, I presume, a statement to that effect in Wood's edition of "Douglas's Peerage." But at whatever date the creation took place, John could not have sat in Parliament in 1457, as he could not have been more than five years old in that year, or than eight in 1460, if the creation be referred to that year; while if in 1460, the ranking assigned to Mar on Lord Redesdale's hypothesis would have been posterior to Rothés, who produced evidence from 1459.<sup>1</sup> But the fact is that there is no notice of any Earl of Mar sitting in Parliament either in 1457 or 1460, or at any date between 1429 and 1476. Lord Redesdale probably overlooked these considerations when developing the argument against the perpetuation of the ancient territorial Earldom in the line of the Erskines, Earls of Mar *ut supra*. I will only remark, in conclusion, that such an arbitrary grant of precedence over the heads of the Earls created between 1457 and 1565 would not have been justified by the terms of the Commission of Ranking, inasmuch as it would have proceeded neither on the "priority" of privilege nor the "precedency" in point of antiquity of creation.

As I observed, before commencing this discussion respecting the ranking of Mar as from 1404 or 1457, the question is subsidiary to the more important point, whether the Commissioners were induced by ignorance of the truth, the result of fraudulent action on the part of John Earl of Mar, to assign a precedence to Mar earlier by a century than the true date of the creation, 1565. This question, too, has been answered, I think, satisfactorily in the negative.

Lord Kellie, it will be seen, brings the Sutherland and Mar cases into comparison and parallelism. I may suggest a present

<sup>1</sup> [Evidence exists in the Exchequer Rolls that John Earl of Mar was *fourth* son of James II.; and as James III. was born on 10th July 1451 (see Mr. Dickson's Preface to Accounts of the High Treasurers of Scotland, vol. i. p. xxvii., note), John could hardly have been born before 1456. The Exchequer accounts further indicate that he was made Earl of Mar in his infancy, in 1458.]

point of identity between them, in that Lord Kellie and Sir Robert Gordon have equally attempted to further their respective causes by casting the odium of dishonest and dishonourable dealing upon their respective ancestors, thus defiling their fathers' graves. Lord Chelmsford's, and still more Lord Redesdale's imputations against John Earl of Mar, are simply the development of Lord Kellie's previous assertions in his Case and by his counsel at the bar. I protest against the characters of honourable men being thus recklessly aspersed after the lapse of centuries, purely upon hypothesis.

(3.) I have still to notice the third of the special objections arrayed against the Decreet of Ranking and the Union Roll, in the shape of Lord Chelmsford's argument, grounded on the statement that six Earls finding themselves prejudiced by being ranked below Mar in the Decreet, "prosecuted an action of reduction of the retour of the 26th March 1588-9," part (it will be remembered) of the productions upon which the Decreet proceeded, and thus in accordance with the proviso "for remeid of law" embodied in the Decreet. Lord Kellie presses this alleged fact against me in his Letter, and I may interpose his words here:—"Lord Crawford states that no peer of an earlier creation than 1565 protested against the precedency given to Mar in the Decreet of Ranking. This is a mistake. In the Minutes of Evidence in the Mar case it is proved that the Earls of Menteith, Morton, Montrose, Eglinton, Glencairn, and Cassillis not only protested but instituted proceedings for the reduction of that precedency. Although Lord Crawford has overlooked the evidence of that action, it did not escape the attention of Lord Chelmsford, who alludes to it in his judgment." Proceeding with my citation—or, rather, re-citation from Lord Chelmsford's speech,—“In searching,” the noble and learned Lord said, “through the voluminous evidence, I have not been able to find any account of the result of this action of reduction; which however shows that the claim of precedence by the Earl of Mar founded upon the retour of 1588 was not suffered to go unchallenged.” Lord Chelmsford is right in the general position that the six Earls objected to—“challenged” is too strong a word—the precedency on the occasion specified; but the remainder of his statement, and, consequently his own and Lord Kellie's inferences, proceed upon

error. The challenge, if so qualified, was not a legal challenge valid in itself, or such as could be entertained by the Court of Session. There was no such action of reduction as Lord Chelmsford imagines.

With a view to precision, I must restate briefly the circumstances of the proceedings in 1622. An action was brought before the Court of Session by the officers of the Crown, the Elphinstones, and a great number of other proprietors within the Earldom of Mar, for the purpose of reducing, not one but both the retours of 1588-9,—the general retour serving Earl John heir in blood to the Countess Isabel, and the special retour serving him heir to Isabel in Strathdee and Cromar. The object of the Elphinstones was to vindicate and retain the grants of lands pertaining to the Earldom made to them by the preceding kings of Scotland during the usurpation inviolate. The six Earls associated themselves with the other pursuers in the summons in the following words:—"And als at the instance of Williame Erle of Monteith, Williame Erle of Mortoun, John Erle of Montroise, Alexander Erle of Eglintoun, James Erle of Glencarne, John Erle of Cassillis, quha be the service undermentionat, be the quhilkis the said John Erle of Mar is servit as narrest and lawful air to the said umquhile Issobel Dowglas of Mar, are hurt and prejudgeit in their honouris and digniteis in our Soverane Lords Parliamentis and publict conventiones;"<sup>1</sup>—the retour referred to here being the general one, not connected with lands, which had been adduced by Earl John in 1606, and upon which, in fact, his claim to precedence depended. There is no doubt that the six Earls deny the right of Earl John to the precedency over them as grounded on the general retour in question; and Lord Chelmsford's comment on the fact is equally temperate and candid; but his mistake lay in imagining that the intervention of the six Earls in the manner shown constituted an "action of reduction" of the Decreet, or even a legal challenge, which could only have been instituted and "prosecuted" in accordance with the forms and conditions provided for by the Decreet, and observed in all other instances of cases of precedency, such as that of Glencairn in 1610, of Eglinton in 1617, of Buchan in 1628, of Eglinton *v.* Glencairn in 1637-48, and others. A claim for rectification of the Decreet

<sup>1</sup> Minutes of Evidence, p. 692; *supra*, vol. i. p. 405.

of Ranking could not be prosecuted by a side-wind, nor without special summons and tabling of the Decreet sought to be reduced, and of the reasons for reduction, etc. etc. As I have already stated, the process of 1622 shrivelled up and collapsed in regard alike to the general and special retours of 1588-9, and is no more heard of, either as regards the substantive territorial rights sought by the Elphinstones and others to be preserved, or the rights of precedency above Mar sought by the six Earls to be impugned; and thus the action (such as it was) by the six Earls remained a *brutum fulmen*, specially characterised as an empty protest by the fact that they never ventured to renew it subsequently. Such renewal would, in fact, have been impossible subsequently to the great decreet of the Court of Session in 1626, which affirmed the validity of the retour of 1588-9, and by such affirmation denounced the challenge of the six Earls in 1622 as a *vox et præterea nihil*. Lord Redesdale, I may add, does not notice this supposed "action of reduction" and challenge.

But I cannot dismiss this matter of the six Earls without pointing out the fact—which would be a valuable argument for the Decreet of Ranking and the heir-general of Mar, were not proof so pointed and so overwhelming as to render it almost superfluous—that the "challenge" of the general retour of 1588-9 as the foundation-stone of the status of precedency awarded by the Decreet of Ranking could only be based on the fact of Earl John deriving his right to the earldom from the Countess Isabel, the right to the title, honour, and precedency under the general retour being identical with the right to the estates under the special retour, both being thus associated in a common denunciation. It is evident that if the Earldom of Mar held by Earl John in 1606 had been a new creation in 1565, and had been ranked too high, the six Earls would have called for any special grant of precedence or other document on which that precedency proceeded for the purpose of cassing and annulling it; but to call for the general retour amounted to an acknowledgment that if that retour stood—as it does stand under the decreet of 1626—Earl John was Earl of Mar as next lawful heir of blood to Isabel, proximately under the ruling charter of 9th December 1404, confirmed by Robert III., and ultimately through descent from the common ancestor,

Gratney Earl of Mar, in the time of Robert Bruce. I do not think that I have overvalued this unlooked-for evidence in favour of the Decreet of Ranking and of the heir-general, and it affords a complete answer to Lord Redesdale's theory of a "peerage-earldom" distinct from the fief, and knocks Lord Camden's law on the head.

I suspect indeed that the introduction of the six Earls into the process of 1622 was at the instance of the Elphinstones, in order to swell the ranks of opposition to the dreaded retours of 1588-9; inasmuch as their names are inserted at haphazard, —Menteith before Morton, Montrose before Eglinton, Glencairn before Cassillis, in each instance at variance with the order prescribed in the Decreet of Ranking, and which the peers thus misplaced would hardly have permitted, lest it vitiated their remonstrance; while Rothes and Buchan, equally postponed if the Mar creation was in 1565, are not introduced at all. Moreover the six Earls were not represented by any special counsel charged with advocacy of their special remonstrance, but, along with Lord Elphinstone and his son, and all the other parties interested in territorial opposition, by Thomas Nicolson and Lewis Stewart. My impression is, that the "challenge" of the precedence under the retour, considered as the foundation of the Decreet of Ranking, was virtually by the Elphinstones for the purpose of embarrassing Earl John; but if so, the acknowledgment thereby that the Earldom of Mar was restored, and not newly created, in 1565, proceeds from the Elphinstones themselves, and from that very Alexander Lord Elphinstone who, as I have shown, was one of the Commissioners of 1606, and certainly knew what then took place, and what he was about in 1622.

Lord Chelmsford proceeds to connect the five retours obtained by Earl John in 1628 with a desire on his part to fortify the supposed deficiencies of the proof brought forward in support of his precedence in 1606. "The proceedings of the six Earls to reduce the retour of 1588, by which the Earl of Mar was served heir to Isabel Douglas, Countess of Mar, seems to have stimulated his activity to obtain some further support to his claim of precedence. Accordingly, on the 22d January 1628, he procured no fewer than five retours finding him heir respectively to Donald Earl of Mar, to Gratney Earl of Mar, to

Donald Earl of Mar, the son of Gratney, to Thomas Earl of Mar, the son of Donald, and to Margaret, the sister of Thomas and mother of Isabella." I need not repeat here what I have already proved, viz., that these retours were obtained by Earl John as the necessary preliminary step to the process against the tenants of Mar and Garioch, calling upon them to produce and establish their rights to property or superiority as against his own claims—the final process in the recovery of the Mar estates, decided by the Court of Session in 1635.

It is not without significance, however, and not merely in itself, but in reference to the Decreet of Ranking, that—not Earl John, but his successor of the same name, protested in Parliament on the 31st August 1639 for higher precedency than that awarded by the Decreet of Ranking, thus initiating a series of protests which have been reiterated in 1661, 1681, 1689, 1696, 1698, 1702, 1703, 1704, and 1705, and subsequently to the reversal in 1824 of the attainder incurred in 1715, in 1824, 1825, 1826, 1830, 1833, 1837, and 1847, at the elections of Scottish Representative Peers. The original fundamental protest is to the effect "that his ryding or siting in this present Parliament do noe ways prejudge him of that place and precedencie in Parliament and other privatt and publick meittings due to him be his rightis and infeftmentis; but that it shall be lafull to him to acclame the same by virtue of his right as accordis of the law,"<sup>1</sup> i.e. according to the signification of those words, more familiar in Scotland than in England, before the supreme civil tribunal, the Court of Session. Sutherland and Mar protested each to the same effect, in general terms, in 1661. In 1681 Mar protested against Sutherland having place before him,—in 1689, "that the calling of the said Earle" (meaning the Earl of Argyll), "or any other Earles befor him, might not prejudge his right of precedency befor the said Earle, or any one or all of the said Earles called befor him," etc. etc. etc.<sup>2</sup> Viewed by the light of the evidence now before the reader, it is impossible to hold that this claim of precedency was based upon withholding and suppression, and still less on destruction of evidence. Nor was any such imputation ever hinted at, or a doubt expressed of the succession of the Earldom

<sup>1</sup> Acts of the Parliaments of Scotland, v. p. 254.

<sup>2</sup> *Ibid.* ix. p. 5.

being to heirs-general, till our own days, in the pleadings for Lord Kellie.

I have stated that, not the Earl John of 1606, but his successor, lodged the first protest for higher precedency in 1639. This also is significant. The Earl of Angus, who held the first place among the Earls, resigned his right to the first vote in Parliament, which his family had always claimed, on his creation as Marquess of Douglas in 1633. Earl John was alive ; and had he been intent on advancing his precedency, as Lord Chelmsford assumes, he might then have been expected to do so. But he left it to his successor to move in the matter.

I submit therefore, in reply to this second category of special objections against the accuracy of the Decreet of Ranking in 1606, that the Decreet was not open to disallowance by the House of Lords in 1875 on the grounds alleged, inasmuch as no documentary or historical evidence essential to the adjudication of the Commissioners upon the precedency question was withheld from the Commissioners in 1606 ; the lost charter or patent of 1565 conferring a personal peerage, of which the destination is presumed to have been to heirs-male of the body according to Lord Mansfield's law, never existed ; and the ranking of 1606 was accurate according to the evidence, whether before the Commissioners in 1606 or the House of Lords in 1875,—the fact following never to be forgotten, that whether or not a charter of the Earldom as a “peerage-earldom” was granted by Queen Mary in 1565, the limitation of that charter, the charter being lost, must be presumed to have been in favour of heirs-general, as urged by the officers of the Crown in 1874, in conformity with the ancient and unvarying presumption of Scottish law, although disregarded by the Committee for Privileges and the House.

I have not yet noticed certain observations by Lord Redesdale and Lord Kellie on the case of the Earldom of Sutherland as compared with that of Mar in reference to the Decreet of Ranking, and which I mentioned at the close of my reduction of their objections into the categorical summary given *supra*.

Lord Redesdale, in the letter with which he lately honoured me, objects that the statement in my Protest that “Mar” was placed next below the Earl of Sutherland in the Decreet of

Ranking is "misleading." That Earldom "did not in the Decreet of Ranking hold the high precedence allowed it by the House of Lords in 1771. Both it and the Earldom of Mar were placed below the Earldom of Erroll created in 1452. I defy you," added my noble correspondent, "to deny this." My answer is, I do not deny that Sutherland and Mar were placed below Erroll, created in 1452; but I have shown the reason why, viz., that Erroll received a higher ranking—of "priority"—above Sutherland and Mar in consequence of the great hereditary office he held, precisely as Argyle was ranked above Crawford for the same reason. The first six Earls on the roll held, as I have shown, with Angus at their head, exceptional and privileged priority of rank; and Sutherland, the seventh in actual ranking, held the first place among the unprivileged Earls, and Mar the second; and this was in precise accordance with the antiquity of their productions, viz., 1347 and 1404; while Rothes, the third, immediately sequent to Mar, similarly received the ranking due to his earliest production, which was that of 1459. My statement was thus not "misleading," as Lord Redesdale qualifies it, when duly considered, as I have above shown.

I take the same exception to Lord Redesdale's assertion that Sutherland "did not in the Decreet of Ranking hold the high precedence allotted to it by the House of Lords in 1771." In the first place, the House of Lords has no power to assign precedence or invert the order laid down in the Decreet of Ranking or in the Union Roll; and this was fully acknowledged in the House in 1877, as I shall in due time show. To have assigned a precedence to Sutherland, even from 1347, would have been to place him above Crawford, and alter the Union Roll, which fortunately has never yet been effected, even unwarrantably, by anything done by the House of Lords. What the House of Lords did in 1771 was to report that the heir-general was in their opinion entitled to the dignity in preference to the heir-male, on the ground that Elizabeth Sutherland, living in 1514, the lineal descendant and representative of William Earl of Sutherland who flourished in 1275, was Countess of Sutherland in her own right, and transmitted the dignity through the succeeding Earls, and thus to the second Elizabeth, who was entitled to it, inasmuch

as the descent of the dignity had never been altered by any subsequent intervention. But further, the Commissioners of Ranking accepted the evidence of the charter of 1347, proving, not that the Earldom of Sutherland was then created, but that the Earldom was then an existing dignity; and in so doing they recognised directly, in the first instance, the transmission of the dignity through Elizabeth in 1514, precisely as the House of Lords did, and inferentially, in the second instance, such antiquity as might be derived from Earls of Sutherland anterior to 1347, and placed Sutherland in consequence first of the Earls in the category of dignities the ranking of which fell to be determined by comparative antiquity of creation, as proved by evidence, as distinguished from those which stood upon the alternate ground of priority through special grant, hereditary office, or ceremonial prescription. The House of Lords made no new discovery, no assignation of precedence in consequence, no correction upon the Decree of Ranking, in 1771, in terms of Lord Redesdale's proposition, but simply affirmed what the Commissioners of Ranking had affirmed before them. My statement in the Protest is thus justified, although I certainly did not make it with any such view or latent object as Lord Redesdale suggests.

Lord Kellie, in his Letter to the Peers, advances the same argument, with an inference or corollary which I must needs notice. "The position of Mar, however," he says, "is by no means singular. The Earldom of Sutherland was created before 1275, and yet that Peerage was placed in the Decree of Ranking after those of Angus, Argyle, Crawford, Erroll, and Marischal, the first of which was created about 1389, and the last about 1458. The Commissioners may have ranked Sutherland according to a supposed new creation which has since been decided not to have taken place; but if so, according to Lord Crawford's argument as to Mar, it is not the Earldom of Sutherland, proved by a decision of the House of Lords to have been created in 1275, but a more recent one, which, if his contention is logically carried out, could still be claimed by the heir-male." In this passage, "created before 1275" would be more correct than "created in 1275," inasmuch as the Earldom existed at least as early as 1225. The fact that the award of the Commissioners in 1606 proceeded on the charter of 1347, which proved the

existence of the dignity at that time, disproves, as already observed, the possibility that they could have proceeded on a new creation in 1514; while, if that had been the case, proof would have appeared of it in the evidence in the "*De Jure Prælationis*." It is to be remarked here that the whole theory of "peerage-earldoms" created by separate grants or patents was unknown in 1606; it is a figment of recent growth, asserted by Sir Robert Gordon, the Sutherland heir-male, in answer to the proof of the descent of dignities to heiresses and the assumption of dignities by the husbands of heiresses supplied by the Sutherland heir-general, and blown to atoms in the Additional Sutherland Case of Lord Hailes, but which, nevertheless, has been maintained, and effectively maintained, by Lord Kellie in his recent claim before the House of Lords. The logical necessity under which Lord Kellie requires me to admit that the heir-male of Sutherland would be entitled to claim an Earldom of Sutherland dating from 1514, as against the report to the Crown in favour of the heir-general in 1771, if it be the fact, as he suggests to be possible, that the Commissioners in 1606 ranked Sutherland according to the supposed creation in 1514, does not approve itself to my apprehension, inasmuch as it is—what Lord Hailes objected to one after another of Sir Robert Gordon's arguments—an hypothesis built upon an hypothesis in an argument; and, sooth to say, the arguments which were successful in behalf of Lord Kellie in 1875 afford the only parallel in this respect to those which proved unavailing when urged on behalf of the Sutherland heir-male in 1771.

I may conclude this matter, so far, by instituting a comparison between the cases of Sutherland and Mar in 1771 and 1875, which reveal a parallelism of which neither Lord Chelmsford, nor Lord Redesdale, nor Lord Kellie, have, so far as I am aware, taken any notice. Lord Mansfield, whose authority stands paramount with all the noble and learned Lords from whom I have the misfortune to differ in respect of the interesting matter before us, spoke thus in his address to the Committee of Privileges on the Sutherland claim, in moving a resolution in favour of the heir-general:—"When a commission was granted that year" (1606) "for classing the nobility according to their several rights, the Earl of Suther-

land was ranked, and thus the evidence of a new creation might have appeared, if any had ever existed. By that ranking the Earl of Sutherland takes precedence of ten Earls whose interest it was to have shown a new creation. But so little notion had they of a new creation at that time, that we see the family soon after complaining that it was not carried to its original. In 1630 it appears they began, and then entered a protestation. Sir Robert Gordon's ancestor wrote a book, a history of the family, which ends that year, and expressly mentions the ancient peerage as descending to Elizabeth. . . . There might have been a limitation of the honours to heirs-male, but no colour of evidence has been shown of such limitation. I am therefore clearly of opinion that the claimant, Lady Elizabeth, is entitled to the dignity." In another contemporary report of the speech the additional words occur, "There could not be a new creation." And after citing the family history of 1630, he adds, "As there is no doubt that women were capable to take it, it is a clear answer to the presumption relied on by Sir Robert Gordon."<sup>1</sup>

What now, I would proceed, are the facts before us in the case of Mar? That the Commissioners of Ranking gave John Earl of Mar, claiming as heir of Isabel Countess of Mar in 1404, precedence over six Earls created previously to 1565. This cannot be, and it is not, disputed; but it is alleged by Lord Kellie, the Mar heir-male, that the dignity had been re-granted by a personal charter or patent, now lost, with limitation to heirs-male of the body, in 1565, precisely as Sir Robert Gordon, the Sutherland heir-male, alleged that the dignity of Sutherland had been re-granted by a personal charter or patent, with limitation to heirs-male of the body, in 1514; and that he, Lord Kellie, is therefore entitled to the Earldom, and not Mr. Goodeve Erskine, the heir-general. Can it be doubted that, if Lord Kellie's claim had been before Lord Mansfield in 1771, that noble and learned Lord would have advised against him, and in favour of the heir-general? His words would have been, upon the point I am at present dwelling upon, the same as those above quoted, the names only changed:—"When a commission was granted that year" (1606) "for classing the nobility according to their

<sup>1</sup> Maidment's Report of Sutherland Claim, pp. 16, 39.

several rights, the Earl of Mar was ranked, and the evidence of a new creation might have appeared if any had ever existed. By the ranking, the Earl of Mar takes precedence of six Earls, whose interest it was to have shown a new creation. But so little notion had they of a new creation at that time, that we see the family soon after complaining that it was not carried to the original. In 1639 it appears they began and then entered a protestation. There might have been a limitation of the honours to heirs-male, but no colour of evidence has been shown of such limitation. I am therefore clearly of opinion that the"—I must here substitute "opposing petitioner" for "claimant"—"is entitled to the dignity." And in the other report of the speech, "There could not be a new creation" is equally apposite; and, "As there is no doubt that women were competent to take it, it is a clear answer to the presumption relied on by Lord Kellie." It will be remembered that the Sutherland case was decided on the presumption in favour of heirs-male, an exception being held to have been established in favour of heirs-general, through the succession of Lady Elizabeth and her son, the ancestor of the second line of the Earls of Sutherland, of the house of Gordon. This presumption is, as I have protested, the reverse of the presumption of Scottish law, which rules in favour always of the heirs-female, throwing the *onus* of disproof on the heir-male; and therefore it was only by a fortunate accident that the Sutherland honours were awarded to the rightful claimant—who ought not, in fact, as I have already observed, to have claimed what she duly inherited by law, but assumed (her guardians acting for her) her hereditary title, leaving it to the heirs-male to institute a process against her. But, even on the pseudo-presumption in question, the cases are still parallel, inasmuch as by the Act of Parliament 1587, and the final Decree of 1626, Robert Lord Erskine is proved to have succeeded lawfully as Earl of Mar in 1435, in right of his mother Janet Keith, wife of Sir Thomas Erskine his father, and eldest coheir of the ancient Earls of Mar, failing the Countess Isabel, thus establishing an exception identical with that which was successfully urged on behalf of the Countess Elizabeth in 1771; but which the Committee for Privileges in 1875 overlooked, under the preoccupations repeatedly insisted upon in

former pages of these Letters. In fine, the House of Lords in 1771 peremptorily rejected the argument for a lost patent which the House has affirmed in 1875.

I have already shown that both Lord Mansfield and Lord Camden admitted the possibility of the succession of heirs-general to dignities, constrained to do so by the proofs laid before them by Lord Hailes ; and, further, that Lord Camden actually based his advice in favour of the Sutherland heir-general on the fact that the Earldom of Mar had descended through females from 1377, the date of Earl Thomas's death, in whom, according to Lord Redesdale, the original Earldom became extinct, down to 1715, when it was extinguished by attainder. I may recite his words at the risk of repetition, but in order to complete the present parallel :—"I see from indisputable evidence that no less than nine of the thirteen ancient Earldoms passed through females and came to females." Lord Mansfield admitted the fact more grudgingly :—"Though ten of the thirteen original peerages stated in Lady Elizabeth's case have gone to females, yet I am not convinced but that the original limitations might have been to heirs-male"—a purely gratuitous supposition. These "nine" Earldoms were Buchan, Athole, Angus, Menteith, Carrick, Ross, Fife, Lennox, and Mar ; in consequence of which the inference was drawn that Sutherland was a tenth. Substituting Sutherland for Mar in this enumeration, the number would be the same, and the inference identical, viz. that Mar was a tenth.

In conclusion, I hope it will be found that I have answered Lord Kellie's challenge and Lord Redesdale's defiance—cartels both of them which I have attempted to meet in the field of honour, in the spirit of courtesy which should govern all such tournaments—fully and satisfactorily, and vindicated my two Protests, in so far as I maintain therein that the precedency awarded to the Earl of Mar by the Decreet of Ranking in 1606 is incompatible with and negatives the contention embodied in the Resolution of 1875, that the existing Earldom of Mar is not the ancient, but a modern Earldom created in 1565. I have further shown, step by step, that the Decreet of Ranking, corrected where necessary under the provisions of the decreet by the Court of Session, and supplemented by the addition of newly created peerages, became from the first, and continued

uninterruptedly to be, the Roll of the Peers in Parliament down to the Union, when it was inscribed into the Journals of the House of Lords, and from that time has been styled the Union Roll, under which sanction and authority it has ever since been called over at the election of Scottish Representative Peers at Holyrood, being still the Decreet of Ranking under a new and loftier name. I have shown (to continue this summary) that the Report of the Court of Session in 1740 was the work merely of one man, and has no judicial or even official authority; and that the abridgment of the Roll used since 1847 is equally without authority, the reference behind it being still and simply to the Union Roll. I have also shown that the Protests on the Books of Parliament "for remeid of law" down to the Union were for the purpose of preserving the right of prosecuting actions for higher precedency before the Court of Session under the clause in the Decreet of Ranking, protective of the rights of aggrieved parties—the same remedy sought and found by the Countess of Buchan and the Earl of Glencairn in the seventeenth century—that these protests were recognised and perpetuated in their full validity and for their original purpose by the House of Lords in 1708; and that the Earls of Crawford and Erroll were ordered by the House of Lords to be summoned in 1769 to oppose the Sutherland claimants for their interest in the face of the renewal or "wakening" of the Sutherland claim to precedency before the Court of Session in 1746; thus testifying to the fact that no change had taken place in the right of prosecution, or in the Court where that prosecution fell to be carried through. It could not be otherwise under the protective sanctions of the Treaty of Union. It follows necessarily that no correction upon the precedency laid down in the Union Roll can be legally and constitutionally effected except by the Court of Session, in terms of the provision in favour of aggrieved parties, the decision of the Court being final and beyond appeal to any quarter, not only according to the provisions of the Decreet itself, but in virtue of the fundamental jurisdiction of the Court as protected by the Treaty of Union. The House of Lords therefore can exercise no jurisdiction over the Union Roll—can issue no Orders affecting it in any way—are bound to respect it; while the Sovereign himself is equally debarred from

interference. The intervention of the Court of Session, if needed, may content the Peers of Scotland as well in the nineteenth as in the seventeenth century.

I may wind up this Letter with a citation from Mr. Riddell's "Peerage and Consistorial Law," in order to show what that profound antiquary held on the subject of the correction of errors in the Decreet of Ranking and the Union Roll; and, if Lord Kellie lays stress on the passage he has quoted against me, I am equally entitled to lay stress upon that which I now commend to his attention; in which, writing of that Decreet, he says:—

"By its express avowal it was only to stand 'ay and quhill' (always and until) 'ane decreit before the *ordinar* judge be recoverit and obteanit in the contrair,' with the natural reservation 'to suche persoun or persounis as sall find thaimselfes interest and prejudgeit be thair present ranking to have recourse to the *ordinar* remeid of law, be reductionn before the *Lords of Counsell and Sessioun* of this present decreit.' These clauses distinctly show who were to be the judges, namely the Court of Session. The struggles for precedence among a fierce and untractable nobility had attained such height as to embroil Parliament and impede public business, demanding this interference of the King and his Council, who, from their high station and power, could alone originate what was physically beyond the Session, although the legal umpires. But the former, having thus impelled the machine, forthwith quitted a field for which they proved themselves unfit to the latter, who thereupon resumed their functions that had been but temporarily suspended. And accordingly the Civil Court, on the 7th of July 1610, at the instance of the Earl of Glencairn, reduced the Decreet of Ranking so far as he was concerned, and gave him the precedence of the Earl of Eglinton, and other noblemen whom it had preferred. Eglinton and they, however, were not disheartened, but on the 11th February 1617 had this decree of reduction reduced, regaining their ascendancy on the roll, which they kept till the 19th of January 1648; when the Earl of Glencairn, resuming hostilities by a duplicate action of reduction, again overcame them; while this incessant and protracted contention, that induced

infinite argument and research into the constitution and descent of Peerages, their descent, etc. had exclusively for its arena the Court of Session. . . .

“So much for the Glencairn and Eglinton contest, which, legally, was only before the Session. There are, besides, other precedents, before and after the middle of the seventeenth century, corroborative of our doctrine. In a dispute between certain Lords and the Earl of Nithsdale for precedence in 1620, they contended that they should not lose their ranking until ‘their right wer decydit be the *judge ordinar*,’ and in a relative negotiation that ensued, it was admitted to be ‘without prejudice of their rights *before the ordinar judge*.’ Precedence was always duly valued by our Peers, while in Protests occasioned thereby in Parliament there is the same reservation. In 1661 Lord Sempill is summarily ranked before Lord Mordington; but ‘without prejudice of Mordington his process of reduction;’ and the Earl of Caithness protests against the Earl of Buchan, that the *interim* decree in 1606 should be observed ‘untill the same be reduced before the Lord Ordinary. No other judicatory was contemplated.’”<sup>1</sup>

<sup>1</sup> Riddell's Peerage and Consistorial Law, pp. 10-14.

## LETTER VIII.

## THE ATTAINDER AND ITS REVERSAL.

THE episode of the Decreet of Ranking and the Union Roll having been thus discussed and settled in the preceding Letter—I trust to the satisfaction of the reader,—I now resume the main thread of the story, taking it up from the death of Earl John, the son of the Earl restored in 1565, and in whose favour the decreet of the Court of Session was pronounced in 1626, and with the accession in 1635 of his son, a third Earl of Mar of the same Christian name, and in whose favour the decreet of 1635 passed upon the process against the vassals of Mar initiated by his father. It was this Earl John, the third, who commenced the series of protests for higher precedency, of which I have already spoken and shall speak of again presently. The fortunes of the family, which had culminated in his person, began in his person to decline. Unswerving loyalty to the royal cause—the hereditary characteristic of the Erskines—throughout the Great Rebellion, was punished by fines and sequestrations up to the date of the Restoration; and, after that event, the debts contracted in the cause of Charles I. and Charles II. necessitated the sale of estate after estate—including the barony of Erskine, their original honour, on the Clyde—till the possessions of the family were reduced to little more than the lordship of Alloa, an ancient Erskine dependence, although dignified by the supreme rights of regality. The seal was set upon these misfortunes and their decadence by the accession of John Earl of Mar, the great-great-grandson of the Earl restored in 1565, to the rebellion of 1715, of which he was, in fact, the leader and head. He was attainted in consequence, and his honours and the remnant of the estates forfeited. The estates were repurchased for the

family some years afterwards, and the attainder was reversed in 1824. I note thus much here merely by anticipation.

During this decline of prosperity and ultimate utter obscurity through attainder, the latter period lasting 110 years, more than one circumstance presses on our notice as indicating the general recognition of the Earldom of Mar as the ancient Earldom derived from the Countess Isabel, and descendible to heirs-general—the modern figment of a personal Earldom created in 1565, with limitation to heirs-male exclusively, being absolutely undreamed of, or if suggested, sternly disallowed. These circumstances are, first, the continued protestations of the family for higher precedency, up to the Union, which I have already treated of; secondly, the testimony of the family themselves early in the last century, but subsequently to the attainder, as to the standing rule of succession to the dignity; thirdly, the testimony of Lord Hailes, the greatest genealogical and feudal lawyer of Scotland—speaking, as he always does, as a judge, not an advocate—and that of the House of Lords, as represented by Lord Mansfield and Lord Camden—to the main fact I have insisted on in my Protest, the unbroken continuity of the ancient Earldom and its descendibility to heirs-general; fourthly, the recognition of all this by the Crown and by the Imperial Parliament at the time of the reversal of the attainder in 1824: (the contentions maintained by Lord Kellie, urged by Sir Robert Gordon, the Sutherland heir-male, in 1771, but rejected then by the House of Lords, first obtained formal recognition in 1875); and fifthly, the resumption of the protestation after the reversal of the attainder.

(1.) The Protests, commencing in 1639, and of which I have enumerated the sequence in the preceding Letter, continued till the Union, suspended necessarily during the period of attainder, but resumed subsequently to the reversal, furnish important evidence as establishing the fact that the Earldom of Mar, as restored in 1565—I am not assuming too much in saying “restored,” as Queen Mary’s word is “restituere”—was the original and ancient Earldom in the opinion not only of the Earls of Mar themselves, but of their brother Earls, and especially of those ranked above them in the Decreet of Ranking, not one of whom, up to the date of the Union—for I leave

the later protests out of view at the present moment—not one of them between 1639 and 1707 ever ventured to protest in reply against what would have been an unheard-of presumption if the Earldom had been in their eyes a creation of yesterday. The testimony alike of the Earls of Mar and of those brother Earls, positive and negative, thus points to one and the same conclusion. I do not reckon the futile and inexplicable menace of 1622, which fell flat on the ear of Scotland, and was not legally uttered, as an exception to this assertion. Nor will any objection be urged to it, I presume, on the score of the alleged suppression and destruction of evidence, after what I have proved in the preceding Letter.

(2.) The testimony of the family themselves subsequently to the attainder, and early in the last century, as to the standing rule of succession to the dignity, in the anticipation of the succession divaricating between heirs-male and heirs-general, falls next to be illustrated; and I do not see that this, any more than the argument just suggested upon the protests, has received the attention that it deserves. This testimony is afforded by the entail of the family estates in 1739 after their purchase for the family—an entail which affords very important corroboration of all that has been said up to the present moment.

To understand what follows, I must enter into a few minute particulars as to the descent and representation of the family, but which will not, I trust, prove tedious.<sup>1</sup>

John Earl of Mar, the attainted Earl, left an only son, Thomas, usually styled Lord Erskine, notwithstanding his father's attainder; and a daughter, styled Lady Frances Erskine. Thomas Lord Erskine died in 1766, without surviving issue. Lady Frances then became heir-of-line and heir-general of the Earls of Mar. She married her cousin-german, James Erskine, son of James Erskine, Lord Grange of the Session, the forfeited Earl's younger brother, and who, after the death without issue of an elder brother in 1774, was heir-male of the house, as Lady Frances was heir-general. Lady Frances and her husband left issue, John Francis Erskine, who was thus both heir-general and heir-male of Mar, and in whose person and favour the attainder was reversed in 1824.

I must further state that, by the clemency of the Crown,

<sup>1</sup> See Genealogy of the Earls of Mar, vol. i. p. 175.

as exemplified in other instances of attainted families, the members and friends of the family of Mar, not immediately descended from the attainted Earl, were permitted to repurchase the forfeited estates at a price much below their value, and to settle them under trust for the benefit of the lineal heirs of the house, though within the line of the forfeited succession. The purchasers and trustees on this occasion were Lord Grange, Earl John's younger brother, and David Erskine of Dun, Lord Dun of the Session, the representative of one of the most respected and ancient branches of the house of Erskine. The purchase concluded, the transaction was completed by a charter from the Crown under the Great Seal, 26th July 1725, upon which infestment followed. But Lords Grange and Dun previously executed—on the 23d March 1723—what is called a “back bond,” in specification of the terms and conditions under which they undertook to hold the property, and expressing—as it is recited in a disposition and entail immediately to be mentioned—their willingness “that the benefite of the said purchase should be for the behoove of Thomas Lord Erskine, only lawful son of the said John, late Earl of Mar” (“late,” as being attainted and legally defunct) “and the other persons after named;” and binding themselves and their heirs “to denude ourselves of the said estates, at least so much thereof as shall remain unsold and disposed upon for payment of the debts therein mentioned” (*i.e.* in the bond), “and to dispone the same to and in favour”—and here follow the destinations, to which particular attention must be paid—“of the said Thomas Lord Erskine and the heirs of his body; whom failling, to any lawfull sister of the said Thomas Lord Erskine and the heirs of her body; whom failling, to me, the said James Erskine, and the heirs of my body; whom failling, to the nearest agnate of me, the said Mr. James Erskine, of the surname of Erskine; whom failling, to me, the said James Erskine, my heirs and assignees whatsoever, with and under the provisions and conditions therein mentioned and underwritten; as the said back bond, containing thereintill” (*i.e.* therein) “severall other obligements and clauses, more fully bears.” The original of this back bond has been missing, as it is stated, since 1826, but its purport is sufficiently clear from the recitation above given.

The two trustees, Lord Grange and Lord Dun, thus repre-

senting the interests of the house of Mar, proceeded to pay off the various debts and incumbrances affecting the property; and ultimately, their work completed, executed a disposition and entail, dated the 6th January 1739, reciting the back bond *ut supra*, and the particulars of their intromissions, and settling the residue of the estate, described in Scottish phrase as “all and haill the Earldom of Mar,” upon the following personages and lines of succession:—1. Upon Thomas Lord Erskine, and the heirs-male to be procreate of his body; whom failing, to the heirs whatsoever descending of the said Thomas Lord Erskine his body; 2. The preceding heirs having failed, upon Lady Frances Erskine, his (Thomas’s) sister and the heirs-male to be procreate of her body; whom failing, to the heirs whatsoever descending of her body; whom all failing, 3. Upon the said James Erskine—beyond which I need not repeat the destination, being the same as in the back bond as above cited—“the eldest heir-female,” it is added, “and the descendants of her body excluding all other heirs-portioners, and succeeding allways without division through the whole course of succession in all time coming, with and under the conditions, provisions, declarations, burdens, faculties, restrictions, limitations, clauses irritant and resolute after mentioned, and no otherways.” Of these provisions and clauses the first is as follows:—“With this provision allways, likeas it is hereby expressly provyded and declared, that the eldest female heir of tailzie above specified, and the descendants of her body, shall exclude the younger and her descendants as heirs-portioners, and shall succeed allways without division; and that the whole heirs of tailzie above-mentioned, as well male as female, and the descendants of their bodies who shall happen to succeed to the saids lands and estate by virtue of the foresaid destination, shall be obliged in all time after their succession to assume and constantly use and bear the surname of Erskine, and take and carry the arms which before the attainder of the said John late Earl of Marr, were worn by the family of Erskine and Marr, in so far as the same or any part thereof can be obtained and legally and warrantably born: and in case”—and I thus arrive at the point of remark which will be my apology for this prolonged detail—in case “the attainder of the said John late Earl of Mar shall

be reversed," shall reassume and constantly use and bear, and shall "take and carry," *ut supra*, "the title, dignity, and honours of the family of Erskine of Marr, and the arms thereof, as their own proper surname and arms in all time thereafter."

The importance of this final proviso cannot but at once approve itself to the apprehension of the reader. It will be perceived,—

1. That the destination of the estates known collectively as the "Earldom of Mar" is to heirs-general, including females, who are preferred in the case of Lady Frances and her children to the heirs-male collateral, of whom Lord Grange, the principal trustee and framer of the entail, was the nearest. In conformity with this settlement, Thomas Lord Erskine having died without issue, Lady Frances succeeded under the entail, and on her death in 1776, her son John Francis Erskine, the same who was restored as Earl of Mar against the attainder in 1824, succeeded at once in her right, notwithstanding that his father, James Erskine, Lord Grange's son, and the heir-male of the family, survived till 1785. I am not aware that this entail of 1739 and its provisions have ever been superseded by any subsequent conveyance; but my remarks on this subject are limited to the bearing of the document on the question of the succession to the dignity of Mar.
2. That by the provisions of the settlement it is made obligatory on the heirs-general, being strangers to the house of Erskine, to adopt the surname and arms of the Erskines Earls of Mar, in the event of their succeeding to the estates in that capacity; and further, what is the most important point for my present purpose,
3. That, in the event, which is looked forward to, of a reversal of the attainder of the Earldom of Mar, the same series of heirs-general, including those who shall be strangers to the blood except by maternal descent, shall adopt and bear "*the title, dignity, and honours of the family of Erskine of Marr, and the arms thereof, as their own proper surname and arms in all time thereafter.*"

I need scarcely insist on the importance of this testimony

as showing that in the opinion of Lord Grange, the principal trustee in the disposition of 1739, the dignity was descendible to heirs-general under the restoration in 1565, and the rights then resuscitated—Lord Grange being the collateral heir-male of the house of Erskine, and the man above all others interested in maintaining the exclusive male succession, had there been a pretence for such interpretation. Not a doubt was felt by him upon the subject; and both he and Lord Dun, his colleague, occupied seats on the bench as Lords of Session, and were well versed in the laws of their country on the point of succession. On the other hand, it is impossible to hold that if the dignity, the restoration of which was so evidently in contemplation, had been understood to be descendible by law to heirs-male, excluding females, Lords Grange and Dun should have settled the estates upon heirs-general, to the effect of separating those estates from the dignity, and leaving the latter to descend unprovided with the property requisite for its support, under the contingency of a divarication of the representation between heirs-general and heirs-male. Lord Mansfield argued strongly upon this ground in his speech on the Cassillis claim: “If the lands,” he said, “were limited to heirs-male, the title of honour cannot be supposed” (the original limitation being unknown) “to descend in a different channel from the lands in the charter.” The converse of this must, of course, be equally true: “If the lands were limited to heirs-general, the title of honour cannot be supposed to descend in a different channel from the lands in the charter.”

It is evident that if Lady Frances Erskine had married a Douglas or a Hamilton, the descendant of the marriage, inheriting under the settlement of 1739, would have been obliged under its provisions to adopt the name and arms of Erskine, and in case of the dignity being restored, to adopt the full *insignia* of the Earldom of Mar as held by the Erskines. It so happened, and most happily, that Lady Frances married (as I have stated) her cousin-german, Lord Grange’s son, an Erskine, and (eventually) the collateral heir-male of her house,<sup>1</sup> and thus reunited the families; but this was a mere accident, not foreseen in 1725, and not contemplated by the terms of the

<sup>1</sup> [Lady Frances’s husband was at the time of the marriage only a younger son of Lord Grange. He had an elder brother Charles, who survived till 1774, leaving no issue.]

disposition of 1739 in question. Lady Frances's marriage took place in October 1740.

All this appears to me to have been overlooked or overruled by the House of Lords, as I shall presently show.

The consequence of what has been shown is, that according to the view and testimony of the family, and of the heir-male of the family in 1739, Lady Frances Erskine, the surviving child of Earl John, would, in the event of the attainder having been reversed some time between 1739 and 1766 (the date of the death of Thomas Lord Erskine, her brother), have become Countess of Mar in her own right; and her son, John Francis Erskine, would have succeeded as Earl upon her death in 1776, in her right, while his father, James Erskine, the younger, Lady Frances's husband, was still alive, precisely as he actually succeeded to the estates under the entail of 1739 in that character.

Considerable difficulty appears to have been felt in appreciating the bearings of the preceding point from the fact that James, the husband of Lady Frances, and ancestor of the later Earls of Mar, was himself an Erskine. The view would be simplified if we were to consider him for the nonce as a Douglas—James Douglas, and his son as John Francis Douglas, assuming the name and arms of Erskine Earl of Mar under the irritant clause of an entail. James Erskine was an absolute stranger to the succession of the Earldom and estates in point of law, notwithstanding that the chiefship of the house of Erskine would still have remained in him, abstractly from those dignities and estates, in virtue of his male representation.

The evidence of the family of Mar in 1739 is thus clear, that the Earldom was understood to be descendible to heirs-general under the restoration in 1565; and the settlement of that year is in precise accordance thus far with the motive cause of the protests repeatedly made in Parliament down to the close of the seventeenth century, claiming a precedence over all the Earls of Scotland—a claim which could only be grounded on the fact that the remonstrants considered themselves to be tenants in legal hereditary succession of a line of Earls existing as such not merely from 1404, as in the Decreet of Ranking, but before Sutherland, whose earliest proof adduced in 1606 was from 1347.

It is further to be observed that the testimony of the family in 1739 is not that of mere impression or belief, which might be mistaken ; it testifies to the continuity of their remembrance of the law affecting the descent of the dignity, as testified by the Act of Parliament in 1587, and the decreet of the Court of Session in 1626, both of which recognise Robert Earl of Mar, the direct ancestor of the Erskines Earls of Mar, as Isabel's legitimate successor alike in the fief and the dignity, in 1435. No intervention having occurred through resignation to and regrant from the Crown to alter the descendibility of the dignity, Lord Grange and Lord Dun had no choice but to recognise the descendibility in question as to heirs-general ; and they provided for the descent of the estates in consequence—that is to say, through interposing no provision in favour of heirs-male, in contravention of the common law of inheritance—in conformity to it.

(3.) Proceeding now to a period thirty years later in the century, we have the evidence, not of the family, but of Lord Hailes, the greatest feudal and genealogical lawyer of his time, as to the descendibility of the Earldom of Mar to heirs-general ; and the fact that the Committee for Privileges of the House of Lords, advised by Lords Mansfield and Camden, but more especially by the latter, based their Resolution on the claim to the Earldom of Sutherland in no inappreciable degree upon recognition of that descendibility.

I have already stated the conditions of the competing claims to the honours of Sutherland in 1769-71, when Sutherland of Forse and Sir Robert Gordon, the heirs-male of the original and the second or Gordon line of the Earls of Sutherland, contended against the right of the heir-of-line, the infant daughter of Earl William, who died in 1766. There is nothing new under the sun ; and the arguments of Sir Robert Gordon in particular were precisely those of Lord Kellie in 1875. Sir Robert's contention, based on the Cassillis case, was, that as Elizabeth, sister and heir-of-line of John Earl of Sutherland who died in 1514, did not bear the title for some time after her brother's death, showing that she did not succeed as Countess in her own right ; and as she and her husband Adam Gordon subsequently appear as Earl and Countess of Sutherland, Adam must have been created Earl of Sutherland in his own person

at some period during the interval; and, as the original patent is not extant nor on record, and the presumption in such cases is in favour of heirs-male of the body; consequently he, Sir Robert, was entitled as heir-male of the body of Earl Adam. Lord Hailes, one of the guardians of the heiress—whom I hold to have been Countess of Sutherland from the moment of her father's death, independently of any call for recognition on the part of the Sovereign, the *onus* resting on the heirs-male to prove their better right against herself as in possession—Lord Hailes, I say, cut through the root of Sir Robert Gordon's theory by adducing proof that out of the thirteen Earldoms existing at the close of the thirteenth century, nine, including Mar, descended to heirs-general, and Sutherland must therefore be held to have been descendible in like manner to heirs-general. Lord Mansfield and Lord Camden, the latter in the most unqualified manner, accepted this proof and argument as sound. "I see from indisputable evidence," Lord Camden said, "that no less than nine of the thirteen ancient Earldoms passed through females and came to females," on which ground, Mar being one of the thirteen, he advised the Committee of Privileges in favour of heir-of-line. Lord Mansfield admitted Lord Hailes's proof to the same effect, although with a qualification. "Though ten of the original Earldoms stated in Lady Elizabeth's case have gone to females, yet I am not convinced but that the original limitations might have been to heirs-male," — a qualification unworthy of serious notice. What Lord Hailes urged, and what the House of Lords admitted in 1771, was simply in conformity with the law of succession in Scotland as exhibited in the case of Mar in 1565 and 1626. But all traces of the truth, all remembrance apparently of its recognition in 1771 had become obliterated before 1875, when Lord Kellie reiterated the old contention of Sir Robert Gordon, *mutatis mutandis*, to suit the case of Mar, and the House of Lords, advised by Lords Chelmsford, Redesdale, and Cairns, ignoring the evidence given by Lord Hailes, which Lord Camden characterised as "indisputable," pronounced in his favour against the heir-general—to the effect that if the Report of 1875 be right, that of 1771 was wrong, and *vice versa*, the two cases of Sutherland and Mar being absolutely parallel in this respect. I merely refer to the proceedings of 1875 to point the contrast,

—the year I stand upon at the present moment is 1771, thirty years subsequently to the Mar disposition of 1739; and I draw attention to the fact that Lord Hailes, Lord Mansfield, and Lord Camden, the two latter representing the House of Lords, bear witness to the accuracy of the views as to the succession of the Earldom of Mar to which Lord Grange and Lord Dun gave expression in the provisions of that disposition as above exhibited.

The result of this survey of the period between the attainder of 1715 and the reversal of that attainder in 1824 is, that, by the concurrent testimony of the family in 1739, by the proofs adduced by Lord Hailes in 1771, and by the recognition of those proofs as valid by Lords Mansfield and Camden in the Sutherland case in that year, Lady Frances Erskine, only surviving child of Earl John who flourished in 1715, would have succeeded to her brother, Earl John's only son, Thomas Lord Erskine, as Countess of Mar in her own right, if the attainder had not taken place; and, carrying the principle onward, that Lady Frances's son by whatsoever husband, whether patrimonially a Stewart, a Douglas, or a Goodeve, would have similarly succeeded as Earl of Mar on her death. It was by a pure accident that Lady Frances married, not a Stewart, but an Erskine, her cousin-german, the heir-male; and this circumstance, I must again repeat, has to a certain degree blinded the perception of some who have considered the question. But for the attainder, Lady Frances's—that is, the Countess Frances's—son would have succeeded to the dignity on her death during his father's lifetime, even as that son, John Francis Erskine, subsequently restored as Earl of Mar, actually did succeed to the estates, under the settlement of 1739, on his mother's death, during his father's lifetime.

(4.) All this was still in remembrance in the auspicious year 1824, when the descendants of so many of the leaders in the insurrections of 1715 and 1745 were restored to their ancient honours by the grace of the Crown. This grace was limited at first to such persons as were the lineal representatives of the attainted peers, and would have been in possession of the respective dignities but for the attainders. John Francis Erskine of Mar, the son of Lady Frances Erskine (by her husband James Erskine, the collateral heir-male, as has been shown *supra*)

ranked in this category; and the attainder was reversed in his favour by Act of Parliament in the character of "grandson and lineal representative" of John Earl of Mar, forfeited in 1715.

The Act proceeded upon a Report to the Crown drawn up and signed by Sir John Copley, the Attorney-General, afterwards Lord Lyndhurst, and Sir William Rae, the Lord Advocate, tracing and certifying the descent of John Francis Erskine lineally from John Earl of Mar through his mother Lady Frances Erskine, Earl John's daughter, without any reference to his male descent through his father James Erskine from Lord Grange, Earl John's younger brother, who, as I have already enforced, was only accidentally an Erskine so far as his matrimonial intervention in the family pedigree and succession is concerned, and might have belonged to any other family so far as the lineal representation of the Earls of Mar was concerned. I have to notice here that the heir-general, whom the House styled "the opposing petitioner" in 1875, was not permitted to put this Report of 1824 in evidence before the Committee for Privileges,—although by an inconsistency difficult to account for—but for which there may have been good reasons, although I cannot divine them—the claimant of the barony of Nairne, likewise restored in 1824 against forfeiture, was permitted to put a precisely similar Report to the Crown in evidence in that claim in 1874. I remarked in my original Protest, when dealing with this part of the subject, that "it is to be observed that the reversals of attainder in 1824 were rigidly restricted to the case of such persons as were the direct heirs of the body of the attainted peers, and would have been in possession as such had the attainders not taken place. There can thus be no question as to the understanding upon which the inclusion of the Earldom of Mar among the restored dignities proceeded; whereas, upon the view taken by the recent Committee of Privileges, viz. that the Earldom of Mar is a dignity descending to heirs-male, the forfeited Earldom would have been excluded from the category. The Act of Parliament," *i.e.* restoring the dignity in 1824, "was thus in strict conformity with the standing judgment of the Court of Session in 1626, and with the precedence from 1404 under the Decreet of Ranking and in the Union Roll." Apart, however, from testimony of such remote date as the

Union, the inclusion of Lord Mar among the favoured individuals, and the language of the Act of 1824 specifying his descent, were, I may now affirm, in natural sequence to the testimony of the family in 1739 and the recognition by the House of Lords of the descendibility of the Earldom to heirs-general, in 1771, as above shown; and I am justified in affirming that that descendibility had never been questioned except by such claimants as Sir Robert Gordon previously to the Report of 1875.

I subjoin the views of Lord Chelmsford and Lord Redesdale—it is but justice to Lord Kellie to do so—as expressed in their speeches in proposing the Resolution of 1875. But I must be permitted, in justice to myself, to interpose a word or two of comment or expostulation in doing so:—

“The Act,” said Lord Chelmsford, “restoring John Francis Erskine and all entitled after him to the honour, dignities, and titles of Earl of Mar, recites that he is ‘the grandson and lineal representative’ of John Earl of Mar. He was the grandson of John Earl of Mar through his mother, Lady Frances Erskine. Upon this fact the counsel for the opposing petitioner argued that it was intended by the Act to restore the dignity to the person entitled as the lineal representative of the attainted Earl; and, as the person restored was only lineally descended from John Earl of Mar through a female, it amounted to a parliamentary recognition that the dignity before the attainder was descendible to females.” I should have thought so too, even independently of the rejected Report to the Crown, which proceeds, as I understand it, upon that precise ground. But Lord Chelmsford proceeds: “There is not, in my opinion, a shadow of foundation for this argument. The intention of the Act was to restore John Francis Erskine to the dignity,” to which I demur; it was to restore the dignity to the person who would have been entitled to it under the limitation of the dignity if the attainder had not taken place, which character had been certified to be vested in John Francis Erskine: as Lord Chelmsford puts it, it was intended to restore him the dignity on the mere assumption that he was entitled to it. “He was undoubtedly the nearest in blood in succession to the attainted Earl, and he had a preferable claim to every other person to be restored,”—but not as lineal representative *qua* the dignity, if

the limitation was to heirs-male, as Lord Chelmsford contended, John Francis Erskine being only Earl John's collateral heir-male. "The recital in the Act, that he is grandson and lineal representative of the attainted Earl is an accurate description of his title, without reference to the course of descent by which it was derived;" but, apart from that reference, the title could not be ascertained, and, unless ascertained, the recital could not be accurate, which cannot be presumed. "There was not the slightest occasion to make any inquiry as to the succession to the restored title, and probably none was made,"—a probability which could only, as it appears to me, have been suggested in the absence of the Report of the law officers of the Crown, which, as I have stated, was not allowed to be received in evidence. "It was enough to restore the dignity to whatever person was best entitled to it, and when restored it would, as a necessary consequence, be subject to the course of descent which was incident to it before the attainder." But there was this difficulty in the way of this easy-going action, that if Lord Mar was restored, being an heir-male collateral, and not inheriting by lineal descent from the attainted Earl, an exception would have been made in his favour to a rule, or rather condition, which the Crown had presented to itself at the time, viz., to restore none but lineal representatives, as above stated. The very words of the Act, "grandson and lineal representative" are unintelligible, unless the restored Earl had a right to the dignity through his mother.

Lord Redesdale's views on the above point are taken in connection with the question "what shall be held to be the remainder under Queen Mary's creation,"—that is, under the supposed new creation "probably by charter," in 1565? "The presumption," he says, "is in favour of heirs-male,"—that is, by Lord Mansfield's rule, the exact reverse of Scottish law, and against Lord Camden's and Lord Mansfield's own admission that the Earldom of Mar was descendible to females in 1771. "What is there in the evidence before us," asked Lord Redesdale, "to contradict that presumption? The only points urged are the charter restoring the Comitatus to heirs-general," *i.e.* the charter of restoration 23d June 1565, "and the fact of the person to whom the Earldom was restored after the attainder being called in the Act "the grandson and lineal

representative" of the attainted Earl, he being grandson only through a female. The charter being a restoration to the heirs of Isabella before the new peerage was created"—*i.e.* by the supposed lost patent or charter of 1565—"naturally left the Comitatus to the old limitation," in which case, I may observe, the presumption would be, according to Lord Mansfield's ruling in the Cassillis case, already cited, that the newly created dignity would be limited so that the estates and the dignity might not separate; "and the words quoted from the Act of Parliament" of 1824 "cannot be held to determine a matter not then inquired into, when the person obtaining the Earldom was heir-male as well as grandson through an heir-female."

Lord Cairns made no observation on the present point.

(5.) Quotations have been adduced from the speeches of Sir Robert Peel and others, when the Bill for reversing the attainders was introduced in 1824, sufficiently proving that they understood that it was the original and almost primeval Earldom which was the subject of restoration. But such evidence is unimportant, as it appears to me, in comparison with the fact that immediately after the reversal of the attainder, John Francis, the restored Earl, who was then an extremely aged man, and died the following year, renewed the ancient claim of his family to higher precedence at the election of Scottish Representative Peers at Holyrood, on the 8th July 1824, through the intervention of Lord Nairne, who entered a protest to the effect that as Lord Mar "has right to be placed as high on the list or Roll of Peers in Scotland as his ancestors the Earls of Mar were placed; and whereas from the records of Parliament and other authorities it appears that the Earls of Mar sat in the Parliaments of Scotland as Earls prior to the ancestors of all or some of the Earls now placed above the said John Francis Earl of Mar in the present Roll of the Peers of Scotland," he, Lord Nairne, prayed "that the said John Francis Earl of Mar may be hereafter restored to his proper place in the said Roll of the Peers of Scotland." Lord Nairne again protested in the same terms on the 2d June 1825,—the Marquess of Queensberry in the same terms in favour of John Thomas Earl of Mar, the son and successor of Earl John, on the 13th July 1826, that he may "be hereafter restored to his proper place on the Roll;" the Earl of Northesk, in favour of John Francis Miller Earl of

Mar, the son of John Thomas, in the same terms, 2d September 1830; Lord Colville of Culross, in the same terms, 14th January 1833—while John Francis Earl of Mar, the late Earl, protested, in his own name, on the 24th August 1837, “that the calling of any Earl’s name before mine is contrary to the well-known antiquity of the Earldom of Mar, and that therefore no Scotch Earl’s name should be called before mine.” And, again, on the 7th September 1847 he protested that, “seeing by historical records that the Earldom of Mar is the most ancient Scotch Earldom now extant, I, John Francis Earl of Mar, hereby protest against any Scotch Earl’s name being called over before mine at the election of Representative Peers for Scotland.”

It thus appears that from the moment after the reversal of the attainder in 1824 the ancient claim of the Earls of Mar as heirs of the oldest Earldom in Scotland revived at once,—as it had been left before the attainder,—a claim totally incompatible throughout with the idea of a re-creation in 1565; and no one entered a counter-protest, as might have been expected had the reversal of the attainder proceeded, as suggested by Lord Chelmsford and Lord Redesdale, upon the theory that the Earldom of Mar restored against attainder was a comparatively modern creation, in 1565, and that John Francis Earl of Mar was restored as “lineal representative” of the attainted Earl, not through that Earl’s daughter and sole representative, but through his (the forfeited Earl’s) brother and heir-male collateral. On the contrary, I submit that these protests tend to prove that the statement of the Act of Parliament, taken with the Report of the officers of the Crown, in 1824, viz., that the dignity was restored to John Francis Erskine as “grandson and lineal representative” of the attainted Earl, is to be understood in its simple and natural sense, as representative through lineal descent of the body of that Earl, necessarily through his daughter Lady Frances, she having been entitled to the dignity of Countess in her own right, but for the attainder.

I should have laid little stress on this matter were it not that the Act of 1824 and the Report of the officers of the Crown have been attempted to be turned against the heir-general in a manner at variance with what I think he was entitled to; whereas they in reality, and especially the Report,

are in keeping with every preceding judicial evidence as to the descendibility of the ancient Earldom, including the Sutherland Report of 1771, as depending in a distinctly appreciable degree upon that descendibility, which, I may add, if not thus in keeping, would have been unwarranted and unjust. Everything should be viewed in its due proportion; and it must not be supposed that in thus vindicating the officers of the Crown and the Act of 1824, I admit that an acknowledgment or admission by the Parliament, or rather by the Sovereign with assent of Parliament, can have the force of a judicial determination upon such a fact as is here in question. Everything connected with the descent of Mar was finally determined by the Decreet of 1626; and every subsequent Act has to be tried by that standard and criterion.

I have now traced the devolution of the Earldom of Mar from the time of the Countess Isabel to the eve of the recent claim of the Earl of Kellie; and I have shown that during all these many centuries the dignity went uniformly in the succession of heirs-general, and a doubt was never entertained on the subject by those competent to judge.

I have elsewhere quoted the words of that great feudal lawyer, Mr. Riddell, regarding the great antiquity of the Earldom of Mar,<sup>1</sup> and I may end this Letter by the words with which Lord Hailes commences his proofs from the history of Mar,—“This is one of the Earldoms whose origin is lost in its antiquity. It existed before our records, and before the era of genuine history.”

<sup>1</sup> *Supra*, vol. i. p. 176.

## LETTER IX.

## LORD KELLIE'S CLAIM, AND THE RESOLUTION OF 1875.

WE now enter upon another act in this prolonged drama, which has still to be played out to its catastrophe.

On the death of John Francis Miller Earl of Mar, the great-grandson of the restored Earl, in June 1866, without issue, John Francis Erskine Goodeve, Esq., only son of Lady Frances Jemima Erskine, by marriage Goodeve, the deceased Earl's eldest sister, and thus his next-of-kin and heir-at-law, became lineal heir and representative of his great-grandfather, the Earl restored in 1824; of Lady Frances, that Earl's mother, who would have been Countess of Mar in her own right but for the attainder; of Earl John, the Earl attainted in 1715, Lady Frances's father; of John Lord Erskine, restored as Earl of Mar *per modum justitiæ* in 1565; of Sir Robert Erskine Earl of Mar, in 1438, after his service as heir of the Countess Isabel; and of Gratney Earl of Mar, the common ancestor of Earl Robert and of the Countess Isabel,—in a word, heir-general of the house of Mar. Time had run its determined course. The succession which had passed from the original "De Marrs" through the Douglasses to the Erskines, and which the Erskines had enjoyed as maternal heritage, and illustrated by their loyalty and manly worth for four centuries, passed once more from their name to that of another race, likewise as maternal heritage, under the same identical destination and tenure. It is impossible not to feel regret on every such revolution; but it is the common lot where the rule of female succession prevails; and the sentiment attaching to it in the present instance is the same as that which inspired the once familiar proverb of tender remembrance,—

"Ilka thing hath its time;  
And sae had kings o' the Stewart line."

Stewart had succeeded Bruce, Bruce Baliol, Baliol the royal race of Celtic Scotland.

The representation of the house of Erskine in the male line, a representation totally distinct from that of the house of Mar, devolved on the death of the late Earl, in 1866, upon Walter Coningsby Erskine, Earl of Kellie, cousin-german of the late Earl, as the son of Henry David Erskine, youngest son of the restored Earl. Lord Kellie died in 1872, and was succeeded by his son Walter Henry, the present Earl.

Mr. Goodeve, the heir-general, assumed the style and dignity of Earl of Mar, with the surname of Erskine, on his uncle's death. His arms were matriculated as such in the books of the Lord Lyon's Office in Edinburgh on the 13th October 1866; and he was duly served "as one and the elder of the two nearest heirs-portioners in general" to his late uncle, John Francis Miller, Earl of Mar, on the 4th March 1867. Not a doubt was entertained at the time by the highest authorities in Scottish law that Mr. Goodeve Erskine was lawful Earl of Mar.

Mr. Goodeve was not only warranted in assuming the dignity of Earl of Mar by Scottish law, but by that law, as already exhibited, the dignity devolved upon him *malgré lui*, after due establishment of his propinquity. Strong commiseration has been expressed, and gracefully expressed, by Lord Cairns, subsequently to the Report of 1875, on the ground that "that gentleman had been supposed to be the person entitled to the peerage of Mar; he had been accepted as such by all who were related to the family, and, among the rest, by that particular family who afterwards became his antagonists for the title. They had received him as the proper heir to the older title, and it was in that position that, after holding it for some years, he found himself opposed by those who had in the first instance admitted his claim." But while this is true, and does honour to the kind heart that prompted the words, it does not go to the root of the matter. Lord Mar succeeded precisely as if he had been the brother's son and next of kin, instead of the sister's son and next of kin, of the deceased earl. It is nothing but the prejudice in favour of the exclusive male succession—in which I fully myself share—that can suggest any anomaly or impropriety in such assumption

Lord Mar entered into possession of the dignity, *pace* Lord Kellie, and of all the rights dependent on it, in obedience to the legal presumption in favour of heirs-general in all cases of Scottish heritage; and he was, and is, entitled to recognition as Earl of Mar from all men, till the heir-male can establish a preferable right, through the adduction of legal proof that an exception has been established in the case of Mar through a special provision in favour of heirs-male as against the heir-general. Whether Lord Kellie has succeeded in establishing such an exception, the reader will judge; but in the meanwhile Lord Mar's right to be recognised as in possession till a counter right was established, with all the consequences of that recognition, has been entirely lost sight of by the House of Lords, as we shall presently see.

Walter Coningsby Earl of Kellie, the heir-male, claimed the Earldom of Mar by petition to the Crown, dated the 23d May 1867. This petition was referred by Her Majesty to the House of Lords in the usual manner, requiring them to "examine the allegations thereof as to what relates to the petitioner's title therein mentioned, and to inform Her Majesty how the same shall appear to their Lordships." Lord Kellie claimed the Earldom, not as the ancient and original Earldom of Mar—which, if the evidence given up to this point be valid, still exists in the heir-general—but as a comparatively modern Earldom, affirmed, as I have repeatedly stated, to have been created by Queen Mary in 1565 by a lost patent, subsequently to the charter restoring the Comitatus of Mar, 23d June 1565; and which patent being lost, the limitation was to be presumed, according to the rule of the House of Lords, to have been in favour of heirs-male of the body of the grantee, Lord Kellie, the petitioner, being that heir-male.

Lord Mar petitioned the House, not the Sovereign, as being not a claimant, in his own style and title as Earl of Mar, on the 17th July 1868, for leave to appear in opposition to the claim of Lord Kellie, as trenching on his own right as actual tenant in possession of the one and only Earldom of Mar on the Union Roll; and permission was accorded to him to do so. But after a short time, he was ordered to expunge the title of Earl of Mar from his Case, and to plead as a commoner. The style of "opposing petitioner" was adopted as a sort of *mezzo-*

*termine*. The presumption was held throughout by the Committee for Privileges to be in favour of Lord Kellie as heir-male, and the *onus* of disproving Lord Kellie's claim thrown upon Lord Mar as heir-general. All this I hold to have been illegal; but I reserve the detail, and my observations upon it, for the ensuing Letter. With this preface I proceed to cite Lord Kellie's narrative of what followed in the House of Lords, as in the Letter now before me.

"The questions which the Committee were asked to decide were three in number:—1. Was the Earldom of Mar, which now exists on the Roll of Scotch Peers, and was held by the Earl of Mar and Kellie, who died in 1866, a new grant by Queen Mary, or a restoration by her of the ancient dignity? 2. Was the dignity descendible to heirs-general, or was it limited to heirs-male? These questions were fully discussed by the only competent tribunal, and an unanimous judgment pronounced upon them, which is final and irreversible. It would therefore be a work of supererogation to say anything in support of a judgment which requires no defence. . . . After the pleadings of counsel were finished, the Committee took several months to consider their judgment. The noble Lords who gave judgment had sat on the case from the commencement to the end of it; and when, on the 25th February 1875, they delivered their decision, not only was their Resolution unanimous, but the ground of judgment, as given in the speeches of the three noble Lords, was identical, viz., that the ancient title of Mar was extinct, and the existing title was created by Queen Mary, and limited to heirs-male. A short extract from each of the speeches will show this:—*Lord Chelmsford*: 'Whether the original dignity was territorial or not, or was or was not descendible to females, is wholly immaterial, inasmuch as it had come to an end more than a century before Queen Mary's time.'—*Lord Redesdale*: 'In 1460 the ancient Earldom was treated by the King as extinct, for he created his son Earl of Mar.' Again: 'This undisputed admission of the extinction of the peerage by the Crown under six Sovereigns, and by six Lords Erskine in succession, from the death of Alexander in 1435 to the grant by Queen Mary in 1565, a period of no less than 130 years, must be looked upon as a settlement of the question which it would be dangerous to disturb.'—*Lord Chan-*

*cellor Cairns*: 'I am of opinion that it is clearly proved that the Earldom of Mar which now exists, was created by Queen Mary between the 28th of July and the 1st of August 1565. It appears to me perfectly obvious from every part of the evidence, that in the greater part of the month of July 1565, and before that creation, there was no Earldom of Mar properly in existence.' The Resolution of the Committee was as follows: —'Resolved—That the petitioner, Walter Henry Earl of Kellie, hath made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland, created in 1565.' This Resolution was reported to the House, and approved of on the 26th of February 1875, and the following Orders of the House were passed upon it;—"but these I reserve for the following Letter, merely remarking that they were passed in the same breath with the Resolution just recited.

The answers of the Committee for Privileges to the two questions formulated by Lord Kellie, as put to the Committee, may be presented in their simplest form thus:—1. The Earldom of Mar which now exists on the Roll of Scottish Peers, and which was held by the Earl of Mar and Kellie who died in 1866, was a new creation by Queen Mary, and not the restoration by her of an ancient dignity; and, 2. The new dignity so created by Queen Mary was limited to heirs-male of the body, and not descendible to heirs-general. These answers are based, as I have fully recognised, on the traditional rules and principles of the House of Lords, adopted since 1762 and 1771, as governing their advice to the Crown, viz., that charters of a dignified fief do not convey the title of honour without express mention thereof, and that the presumption in all cases of doubt is in favour of heirs-male of the body of the original grantee, and against the heirs-general; and also that the House of Lords is entitled to disregard and set aside the final judgments of the Court of Session proved before them, and the presumption of Scottish law. The various rulings or points of detail throughout the Mar case, which I have noticed in the preceding Letters, are governed throughout by these rules and principles. But I too have put three questions of my own, which require their answer—1. Are the principles which I have appealed to in my two Protests against the recent Resolution and what has followed upon it, and which I have vindicated in the

second of these Letters, of binding obligation upon the House of Lords, or not? 2. If of binding obligation, have the House of Lords observed and obeyed those principles in reporting in favour of Lord Kellie's claim to an Earldom of Mar created in 1565, as by their Resolution? And, 3. If the House have not observed and obeyed these principles, but applied and enforced the traditional in contradiction to these principles, and if these traditional rules and principles, and the law of the land, are thus in collision, which is to prevail—not merely in the long-run, but at present, in this particular case of Mar? As regards a minor point in Lord Kellie's observation, I need not repeat that the question is not between myself and three noble Lords whose "judgments" Lord Kellie alleges as conclusive, and whose learning and just-mindedness I should be the last to question, but between the law of Scotland, and the binding authority of judgments of the Court of Session, as protected and enforced by the Treaty of Union, on the one hand, and a system of doctrines contradictory of that law, that authority, and that Treaty—in a word, of a system, of which Lord Chelmsford, Lord Redesdale, and Lord Cairns have been simply, in this Mar case, the hereditary spokesmen. I cannot allow myself to be represented as speaking on my own authority in the presence of Chancellors and ex-Chancellors. It is Lord Hailes, Lord Stair, Sir Thomas Craig himself, the Kings and Parliaments of Scotland, the Supreme Civil Court of Scotland, and even, from time to time, Lord Mansfield, and Lord Camden, and the House of Lords, which followed their advice in the Sutherland claim of 1771, who testify on behalf of the heir-general of Mar, and against Lord Kellie's pretensions.

I proceed now to examine the Resolution of 1875 and the opinions of the noble and learned Lords, as given in their speeches, by two crucial tests: Is that Resolution and are those opinions in conformity with the views and the judgments pronounced by the Court of Session in the identical case of Mar in 1626? And, similarly, Are they in conformity with the law of succession in Scottish heritage, including dignities, and the presumption arising therefrom, as affirmed by the Court of Session in the Oliphant judgment in 1633, to say nothing of constitutional history and institutional authority, and which would determine the present case, even had the judgment of

1626 never been pronounced? I take the judgment of 1626 first, inasmuch as I have laid fundamental stress upon it in my original Protests. It is impossible to avoid some repetition, and for this I must apologise. But repetition has sometimes its advantage, as exhibiting truth from the many sides of her envisagement.

I. The Battle of the Books is famous in literature. But the Battle of the Charters ought to be still more famous in the annals of the Scottish Peerage.

The question of 1875 turns, as the same question did in 1626 and 1565, on the respective validity of two little scraps of parchment, the charter of Isabel Countess of Mar dated the 12th August 1404, and the subsequent charter by the same personage, dated the 9th December 1404. If the former be valid, the Earldom of Mar became extinct on the death of Alexander Earl of Mar in 1435; the Crown was justified in resuming the fief and the dignity, and dealing with it, as it did thereafter, at its pleasure; the Erskines were lawfully excluded; Queen Mary and her advisers in 1565, and Parliament in 1587, were totally wrong in holding the contrary view; and the grant in 1565, which Mary styles a restitution, and which proceeds *per modum justitiæ*, not *gratiæ*, was a new and uncalled-for grant—necessarily of a new Earldom—although not necessarily, for reasons already given from Scottish law, in favour of heirs-male; but, even on the theory of a lost charter, descendible to heirs-general. If, on the other hand, the later charter of the 9th December 1404 be valid, then the reverse obtains, as set forth in the preceding pages: the grant in 1565 was simply a restitution of what had been unjustly and fraudulently withheld from the lawful owner—John Lord Erskine was replaced in the position of the Countess Isabel under the same right of next heir which had been recognised in his ancestor Robert Earl of Mar by a lawful inquest in 1438; the succession continued in the line of the heirs-general; and the heir-general is now Earl of Mar under the original and only dignity as held by the Countess Isabel in 1404—while he would have an equal right, as pointed out by the law officers of the Crown in 1874, under the alleged new creation of 1565, founded on by Lord Kellie, who is absolutely excluded, either way, from the inheritance,—if it ever had existed.

Such being the question between the two charters, what is the test of validity as between them? This is determined by law and by authority in favour of the later charter, that of the 9th December 1404; in other words, in favour of the heir-general, on a principle already noticed:—

1. No alienation of a fief held *in capite* of the Crown is valid unless previously sanctioned or subsequently confirmed by the superior, who was in the Mar case the Sovereign. The charter of 12th August 1404, extorted as has been shown from the Countess Isabel, and which worked injustice not only against the Countess's heirs on her mother's side, the Erskines, but against her heirs on her father's side, the Douglasses, and upon herself, as well as transferring rights of the Crown to others without the consent of the Crown, was never sanctioned or confirmed by the Sovereign, and was subsequently renounced and abandoned by the man himself, Alexander Stewart, who had extorted it. But the charter of the 9th December 1404, which committed no injustice, and reserved the rights of the Countess's heirs and other parties, was duly sanctioned and confirmed by the Sovereign by charter 21st January 1404-5. This latter charter, thus confirmed, is therefore the only legal conveyance, and was recognised as such in 1565, in 1587, and by the Royal Commissioners who issued the Decreet of Ranking in 1606—all previously to the great decret of 1626, and subsequently to the decret by the heirs-male of the family themselves, as I have shown, in 1739; and by the House of Lords, as also shown, in 1771, when the Report in the Sutherland case, favourable to the heirs-general, went, in part, on such recognition—and in 1824.
2. This view of the law, as applicable to the case now in question, is laid down and enforced, as the reader will recollect, by the Supreme Civil Court in the great Mar and Elphinstone case, so repeatedly noticed, in 1626: when the Lords sustained the validity of the charter 9th December 1404, confirmed by the charter 21st January 1404-5, as against the charter 12th August, which was not confirmed—the foundation-stone of Elphinstone's right—declaring the former and all that followed it valid,

the latter and all that followed it invalid—recognising the retour and the status of Robert Earl of Mar in 1438 to have been valid in consequence, and the annulment of that retour by the inquest of 1457 to have been invalid, because that annulment was based on rejection of the later and dependence upon the earlier unconfirmed charter; and stigmatising the exclusion of the heirs-general, the Erskines, by the Crown subsequently to 1435 and till 1565, as illegal and unjust, because the Crown had no right of property in the Earldom, but mere possession, during that interval. The noble and learned Lords who advised the House of Lords in 1875 held that this decret affected only the fief and not the dignity, on the ground that the dignity is not specially mentioned in the charters of 1404, in accordance with Lord Camden's rule; but I have shown in the Second and Fifth of these Letters how untenable that rule is: and the very fact that Robert Earl of Mar was recognised as such in the Act of 1587, and that the Decreet of Ranking proceeded upon the charter 9th December 1404 and what followed upon it as grounds for precedency, testifying, no less than the recognition of Robert Earl of Mar in the decret of 1626, that the fief dealt with was a dignified fief, which carried the dignity under due sanction from the Crown without any special mention of it, as I have previously explained, as substance carries shadow. The result is that the present Earl of Mar stood in 1866 in precisely the same situation with reference to Lord Kellie as his ancestor John Earl of Mar stood with reference to Lord Elphinstone in 1626. The question brought up by Lord Kellie in 1875 has been *res judicata* since 1626—the judgment was binding upon the House of Lords to such an extent that they were precluded *ab initio* from discussing Lord Kellie's claim upon the grounds upon which he advanced it, inasmuch as it is a case in which, in Lord Eldon's words upon a Scottish appeal case, a competent decision “has removed out of the way all argument and all principle, so as to make it impossible to apply them”—of course, legally—“to the case before the House.” The result is,

that, tried by the decret of 1626, a crucial test, the Resolution of 1875 and the opinion of those who moved that Resolution in favour of Lord Kellie, are shown to be erroneous; and the right which they have affirmed in favour of Lord Kellie is, by the decret, in Lord Mar. But, on the other hand,

II. If there had been no such judgment as that of 1626 on the special case of Mar to bind the Committee for Privileges in 1875, and discussion had been admissible, the House would have been equally bound to report against Lord Kellie, in deference to the solemn affirmation of the law of succession, as governing similar cases, as expressed by the final judgment of the Court of Session in the Oliphant case in 1633, to the effect that "use" is "enough, conform to the laws of this realm, to transmit such titles in the heirs-female, where the last defunct had no male children, and where there" is "no writ extant to exclude the female,"—to say nothing of the consecutive series of testimonies from the public Acts and institutional writers of Scotland, which the House is presumed to be familiar with, and which, as I have shown, they actually recognised in the case of Mar in 1771.

Such, then, being the test as between the rival charters of the 12th August and the 9th December 1404, as applied by the judgment of the Court of Session in 1626, and which is decisive on the merits of Lord Kellie's claim, it stands out on the speeches of the noble and learned Lords who advised the Committee of Privileges in 1875, that (except in regard to one comparatively unimportant point) they overlooked the decret of 1626 altogether, tacitly repudiating the binding force of that decret, as their predecessor Lord St. Leonards had avowedly repudiated that force in the parallel case of the Glencairn and Eglinton decret of 1648 in the Montrose claim of 1853; and that they affirmed the validity of the extorted and unconfirmed charter 12th August 1404—Lord Chelmsford avowedly and Lord Redesdale inferentially—as against the later confirmed and therefore only valid charter of the 9th December 1404, in apparently unconscious but practical reversal of the judgment of 1626—that judgment being to the effect that the earlier charter was invalid because not confirmed, and the later charter valid because confirmed by the sovereign supe-

rior; in other words, assuming that Isabel, a Crown vassal, could alienate her fief, with the dignity annexed to it, to a stranger without authority from her overlord, and thus impose a vassal and his heirs upon his recognition, apart from his cognisance or consent, in place of herself and her own heirs—a thing absolutely unheard of in feudal law. It is not wonderful that the laws and usages attaching to feudal dignities should be unfamiliar to a Committee for Privileges in the present day, nor is it every Scottish lawyer to whom they are familiar; but the evidence of all this was in print in the Minutes and under the eye of the House, to say nothing of the Sutherland Case of Lord Hailes, which no judge or adviser in such cases can be presumed to be unacquainted with; and if the Committee under such advantages have misapprehended the law, Lord Mar and the cause of truth must not be the sufferers. The result they came to in 1875 was that which the Court of Session in 1626 rejected as pleaded for by Lord Elphinstone (with, I must be allowed to say, the same evidence before them which has been lately before the House of Lords), viz., that the original earldom was extinguished; and when the question presented itself how the earldom continuously existing since 1565 came into existence, and what was its limitation, they applied the traditional doctrine of the House (as we have seen) to its solution.

It may be well to specify one or more of the steps by which they reached this conclusion:—First—whereas by Scottish usage, as I have shown in a former page, a charter of Comitatus, *i.e.* of what is called a “territorial earldom” or dignified fief, carried the dignity annexed to the chief messuage without any special mention of the title, the shadow following the substance, and this to a later date than 1565—the charter of the Comitatus of Mar 23d June 1565 thus conveying what is now called the title, which the grantee duly received after feudal investiture, the House of Lords, on the other hand, applied Lord Camden’s rule affirmed in 1771, viz., that no charter of a Comitatus shall be held to convey the title unless the latter be specially mentioned in the charter, and thus removed the charter of the Comitatus of Mar 23d June 1565 out of the field of consideration as a grant of dignity. The second stage was to presume a contemporary creation of the dignity of Earl of

Mar, as a personal honour independently of territory, by a patent—"probably by charter," but patent under such circumstances would be the more correct word—which has been lost—a presumption which I have shown in a former page was not allowable on such easy considerations in Scottish law, and had in fact been rejected by the House when urged by Sir Robert Gordon in 1771, to say nothing of its rejection by the Court of Session (except under conditions prescribed in such cases by law) in the Glencairn and Eglinton case in 1648. And, thirdly, they laid it down, that, no evidence existing respecting this charter of 1565 creating the peerage, the limitation must have been to heirs-male of the body, or by the principle adopted by the House in the Cassillis case in 1762, and, in Lord Loughborough's words in 1797, "anxiously adhered to ever since," although in contradiction to the final and binding judgment on the point in the Oliphant case in 1633, which Lords Hardwicke and Mansfield overruled in 1762, and Lords Mansfield and Camden in 1771, and which has equally been held aloof from ever since. Whereas, as I have already said, even if the judgment of 1626 had never been pronounced, the Scottish law of succession, as affirmed by that judgment, would have determined the question of Mar in favour of the heir-general. Every minor point occurring in the case was governed and ruled in favour of the heir-male and against the heir-general, upon the general principle of 1762 above stated.

I pause at this point to remark that I do not know that the inevitable propagation of error by error can be illustrated more strongly than by the concluding argument in Lord Redesdale's speech, in applying the preceding principles:—"There cannot be any doubt," he observed, "of the barony of Erskine going to heirs-male under the presumption before-mentioned,"—"the presumption," that is, "in favour of heirs-male,"—"and the same presumption leads me to consider that when John Lord Erskine was created Earl of Mar, that Earldom must be held to go with the barony to heirs-male." This argument, I may interpose, is the same with that upon which Lord Mansfield advised the House in the Cassillis claim in reference to a supposed charter of regrant of the Earldom of Cassillis in favour of heirs-general, but in which the title of Lord Kennedy was not included,—“If . . . this charter was to operate as a new creation, the title of

Lord Kennedy must go one way, and that of Earl of Cassillis be separated and go in a different channel. But it is not possible to believe that this could ever be intended." The argument would be a very good one if the premises on which it is based were solid, but this is not the case. The argument from presumption tells, I fear, in precisely the contrary direction from that indicated by Lord Redesdale, when grounded upon the Scottish law of succession—the hypothesis of the earldom being a recreation in 1565 being assumed, of course, *pro argumento*, as correct. By the law and presumption of Scotland the barony of Erskine, the patent being lost, and the original limitation unknown, goes indubitably to the heir-general, *i.e.* to Lord Mar, unless it can be shown that it has passed over a female to go to an heir-male collateral on some former occasion, or that the limitation of the principal fief of the family at the time when the barony first appears was to heirs-male; and if this cannot be shown, then the presumption from the one dignity to the other, from the earlier creation to the later, would be, that the Earldom of Mar, being granted by Queen Mary as an enhancement of dignity upon the previously existing barony, the limitation of the Earldom must be presumed to be the same as that of the barony, and thus to heirs-general. And upon this once more the presumption would follow, equally acted upon by the House of Lords on former occasions, that—as it cannot be supposed that it was in contemplation that the newly created earldom, founded on the barony, should go to heirs-male, and the estate to heirs-general, so as, under a not improbable contingency, to deprive the earldom and barony of the property necessary for their support—the destination of the estates granted contemporaneously with the personal earldom must have been, or would be found on inquiry to have been, limited to heirs-general, with the view of securing the perpetuation of the dignity and the estates in the same line of descent. It was upon this presumption that Lord Mansfield advised the House in the Cassillis claim, that "if the lands were limited to heirs-male, the title of honour cannot be supposed to descend in a different channel from the lands of the charter." As it actually happens in the present case, the charter of the "Comitatus" 23d June 1565 is destined "*hæredibus*," or to heirs-general; so that the presumption under the Scottish law as to the descent

of the dignity under the hypothesis of a new creation in 1565 is actually justified by the existing evidence as to the descent of the estates; and all is in connection and harmony, and in accordance with the principle founded on by Lord Mansfield. On the other hand, according to the presumption of the House of Lords, and of Lord Redesdale, the estate would go one way, to heirs-general, and the two dignities of Erskine and Mar another way, viz., to heirs-male, under conditions of absolute pauperism in the contingency contemplated. But, throwing aside the preceding hypothesis, and looking to the state of things as above established by the light of Scottish law and the judgment of 1626, the Earldom of Mar, restored in 1565, came to the Erskines as originally maternal heritage, and therefore might descend in the same channel of heirs-general, whether or not the barony and estates of Erskine were so limited. The Earldom of Mar was not by that law a dignity superimposed upon the Lordship of Erskine, and thus in the same boat, as affirmed by Lord Redesdale.

I have further to remark and enforce, before winding up this Letter, that the fact of the recognition of the Earldom of Mar, fief and dignity, as legally continuous in the heirs-general from the days of the Countess Isabel, as shown by the Act of Parliament 1587, by the Decreet of Ranking of 1606, by the series of protests for precedency over all the earls of Scotland, ranging from 1639 to 1705, by the evidence of the heirs-male of the family to this point afforded by the disposition of 1739, by the actual recognition of the earldom as one of the ten ancient earldoms descendible to heirs-general, upon which Lords Mansfield and Camden advised the House against the claim of Sir Robert Gordon and in favour of the infant Countess of Sutherland; and, lastly, by the actual language of the Act of reversal of attainder in 1824, even independently of the preceding but excluded Report of the law officers of the Crown—all these proofs resolving into one great collective fact, establishing a chain of unanimous legal recognition down to 1875—was either overlooked, denied, or explained in a sense adverse to what I have demonstrated to have been their real import by Scottish law in this case of Mar. That the noble and learned Lords, and the noble Lords who delivered these opinions, especially Lord Chelmsford and Lord Cairns, took

pains and trouble, with the evidence before them in print, for several months, to ascertain the truth—the claim having been, moreover, before the Committee for upwards of eight years, as affirmed by Lord Kellie, cannot for a moment be questioned—it was very different from the Montrose case, in which the hearing began on the 18th July, and the case was shuffled out of the House by a Resolution on the 5th August 1853, before the evidence had been printed, much less examined and considered as before the House. There was nothing in the Mar case of such precipitancy; and, as I have said again and again, but I can never be weary of repeating, it is the traditional system of doctrine adopted by the House of Lords in 1762, and the principle of holding themselves entitled to disregard the final decreets of the Court of Session pronounced before the Union, as adopted in 1762, 1797, and 1853, which has been responsible for this, and for the miscarriage of justice generally against which I have protested, and not the noble and learned Lords who, with every intention to advise the Crown correctly, have thus fallen into error. In the Cassillis and Sutherland cases, the House reported in favour of the rightful claimants on wrong grounds; in the present, where there was only one claimant, Lord Kellie, they have reported on equally wrong grounds in favour of a claim to a dignity which never did nor ever can exist, and in favour of a man who has not the slightest pretension to it by Scottish law.

I cannot but take notice once more in this place, that the House came to their Resolution in direct opposition to the advice of the law officers of the Crown, the Attorney-General, and the Solicitor-General for Scotland, the former of whom, speaking for the Solicitor-General and himself, concluded his address on the 16th June 1874, as follows:—"On the part of the Crown all I can submit to your Lordships is this: that, having regard to all the surrounding circumstances, it becomes immaterial to consider whether there was a re-creation or a restoration to the dignity of Earl of Mar in 1565; inasmuch as, if it was a re-creation, the surrounding circumstances are sufficient to indicate the intention that the dignity so created should descend to heirs-general, and that it should not be limited to heirs-male. On the other hand, if it was a restoration of the previous dignity, there is sufficient evidence in the case to

show that that previous dignity had been in like manner descendible to heirs-general." In conformity with this high authority, I observed in my Second Protest that "Lord Mar would be entitled . . . as heir of line to the Earldom of 1565, were such a dignity in existence, no less than he is to the ancient and existing Earldom holding its precedency from 1404"—applying this argument to a particular point which I shall have to deal with in my next Letter, and need not insist upon here.

It thus appears that the Resolution of 1875 and its *rationes* are at daggers-drawn with the law as laid down, with respect to the rival charters and the historical facts which preceded and followed them, by the final and ruling decret of 1626, and by the Scottish law of succession generally, both as protected by the Treaty of Union. As I have already asked, Which is to prevail, the private doctrine of the House of Lords, as applied in this particular Resolution, or the law of the land? It is a question for futurity to settle. Meanwhile I submit that I have vindicated my two Protests against Lord Kellie's criticism.

It remains for me in terminating this Letter to call attention to the practical effect of the recent Resolution of the House of Lords. It cannot, as I have submitted, have the slightest effect on the legal rights of the heir-general, inasmuch as the House has never had authority to pronounce upon those rights, as I shall ere long show. But practically, and in the action taken upon it—to be dealt with in the ensuing Letter—that effect has been to restore the state of things which existed between 1435 and 1565, and which Queen Mary in 1565, Parliament in 1587, and the Court of Session in 1626 declared to have been the result of cruelty, injustice, oppression, and iniquity, to full vigour, against the heir and representative of the man in whose favour Queen Mary intervened in 1565—it is now alleged, on erroneous information—to restore to him—"restituere"—the rights which had been unjustly withheld from his ancestors and himself till that time,—the Queen declaring herself moved by conscience to do so, and her action proceeding upon the solemn verdict of an inquest to the foregoing effect. Further, in the face of the censure passed by the Court of Session in 1626, first, upon the action of Alex-

ander Stewart, subsequently Earl of Mar, in extorting the charter of the 12th August 1404 from the Countess Isabel, and resigning the Earldom when in possession as a mere life-renter, to James I. in 1426; and secondly, on James I. and his successors, as dealing with the rightful heritage of the heirs-general, the Erskines, as if their own property, on the grounds of law above detailed, the House of Lords has acquitted them all, justified every step taken against the heirs-general by men "non habentes potestatem," and (so far as they have power) have excluded Isabel's present representative, whom I am bound as a loyal subject and a good citizen to term the one and only Earl of Mar, from his inheritance—given it to one a legal stranger—and reduced himself—if not from the status of a Baron or Lord of Parliament, as Lord Erskine—from the status of Earl; while, as I shall show, they have further endeavoured to prevent his exercising his right of vote as such. In short, in this nineteenth boasted century we have witnessed not merely the vindication but, so far as is possible, the reimposition of the actions and injuries which moved Queen Mary and her advisers and contemporaries to indignation and sympathy, and which they—men of the most opposite factions in the State—concurred towards redressing. If the noble and learned Lords who advised the Committee for Privileges in 1875 are to be credited, the Court of Session in 1626, Parliament in 1587, and Queen Mary and her advisers in 1565, took a totally erroneous view, alike of the law governing feudal succession and the devolution of dignified fiefs held *in capite* of the Crown, and of the historical circumstances of the 160 years intervening between 1564 and 1404,—it being reserved to the noble and learned Lords in question for the first time—their predecessors in the House in 1771 having been equally blind with Queen Mary—to correct the error. The Royal Commissioners appointed by James VI. for settling the precedence, as they did by the Decree of 1606, took an equally false view in favour of the house of Mar, induced thereto by the fraudulent suppression followed by wholesale destruction of documents—which, nevertheless, all reappeared afterwards as evidence in 1626, a fact overlooked in the speeches in Committee. But, most marvellous of all, the Court of Session were no less in error when, after a process lasting through

several years, and in the face of most formidable opposition, on the part of the Crown vassals who had obtained portions of the Earldom of Mar by gift from the Crown during 130 years of usurpation, the Court determined by a decret, final as being *in foro contentiosissimo*, and ruling even at the present moment as the foundation of rights to vast landed property, that the pursuer, the Earl of Mar, was the real and rightful owner of all these rights, and entitled to restitution in his character of lineal representative of Robert Earl of Mar, who flourished in 1438, and as heir and representative of the Countess Isabel, the dependants, in actual possession of the property of which they were thus deprived; being so deprived, absolutely and solely on the ground of the validity of Isabel's charter of the 9th December 1404, which the House of Lords has declared to be invalid, as against the unconfirmed charter 12th August 1404, which the House has declared to be valid—the Court being thus in error—the barons who were the defenders and cast in the action having been unwarrantably dispossessed by that decret of their lands and superiorities, while the decret itself, which alone possesses the character of finality and irreversibility which Lord Kellie attributes to the so-called “judgment” of 1875, may be trodden under foot, and the contention of the defeated parties enforced against the right of the successful prosecutor—his heir-general, the lineal heir of Robert Earl of Mar—in the present day. Strange as it may appear, all this follows *ex necessitate* upon the premises laid down by Lord Chelmsford, Lord Redesdale, and Lord Cairns, in their speeches upon Lord Kellie's claim. Everything is consistent and consonant with law, justice, and history, which springs from the charter of December—everything the reverse which springs from that of August—1404. Lord Mar stands on the former—the House of Lords on the latter. Law and the highest court of Scotland have pronounced in favour of the former by an irreversible judgment. The House of Lords have advised the Crown in favour of the latter. I again ask, Which is to prevail?

## LETTER X.

## THE HEIR-GENERAL NOT A CLAIMANT.

I HAVE now brought this narrative down to the adoption by the Committee for Privileges of their Resolution upon Lord Kellie's claim on the 25th February 1875. While vindicating my Protests in point of principle, I trust that I have equally vindicated myself against any suspicion of personal disrespect for those who formulated the Resolution, although I may acknowledge prior claims on my deference on the part of elder authorities in Scottish Peerage Law. I have sketched the practical effect of the Resolution—or, in strictest accuracy, of the views on which the Committee arrived at their resolution—retrospectively, in so far as these views repudiated the construction put by Mary Queen of Scots and her advisers in 1565, and by the Court of Session in 1626, upon the usurpation of the earldom by the Crown from 1457 to 1565, and upon the legal value of the extorted and unconfirmed charter of the 12th August 1404. It remains for me to exhibit the practical effect of the Resolution prospectively upon the heir-general, Lord Mar, from the 25th February 1875, the day on which the Resolution was passed, to the present moment. Action was taken by the House of Lords in a series of Orders issued upon the very next succeeding day, the 26th, when the Resolution of the Committee was reported to, and approved by, the House; but I shall defer my narrative of what then took place to the ensuing Letter, and, pausing upon the Resolution of the 25th, consider, as at the most convenient place, two questions suggested by Lord Kellie's Letter, which cover the ground of discussion both before and after the Resolution. These questions are :—1. By what right did the heir-general of Mar originally assume and continue to assume and bear the title of Earl of Mar, apart from any sanction on the part

of the House of Lords, and subsequently to their Report in favour of Lord Kellie? And, 2. In what character did Lord Mar appear before the House of Lords on the occasion of Lord Kellie's claim? Upon the first of these points, Lord Kellie affirms that the heir-general had no right to assume the dignity apart from previous recognition by the House of Lords, and that his continuing to assume it after the judgment of the House in his own favour is illegal. Under the second, Lord Kellie affirms that Lord Mar appeared at the bar of the House of Lords as a claimant of the dignity, between whom and himself (Lord Kellie) the House were empowered to adjudicate, and did adjudicate. I venture to hold and assert the direct contrary on both these points. The two questions, and the answers to be given to them, are most important ones, both in the principles they appeal to, and in their practical bearing as affecting the construction we must put upon the legality of the action taken by the House with reference to Lord Kellie's appearance before them during the recent claim and since. I shall, as in former cases, state Lord Kellie's views upon the two questions in his own words, before vindicating my own:—

1. Lord Kellie, in his Letter, not only blames Lord Mar for having thus assumed the title, but takes strong exception to my recognising him as justified in doing so. "Lord Crawford," he says, "has thought it consistent with his position as a peer of Scotland, not only twice to protest against my right to vote as Earl of Mar, and to ascribe that title to the defeated claimant, but has taken the unprecedented course, in concert with that defeated claimant, of endeavouring to induce other peers to follow his example," etc. "Mr. Goodeve's assumption of the title was irregular from the first, and his continuance of it in defiance of the judgment of the House of Lords is illegal." "Mr. Goodeve, . . . in addition to assuming the title, . . . also added the name of Erskine to his patronymic." "Lord Crawford maintains that Mr. Goodeve Erskine is in possession of the Earldom of Mar, and cannot be dispossessed of it. I have shown that he merely assumed the title without any authority, and continues to make use of it in defiance of the judgment of the House of Lords. It may be true that, in an undisputed case of succession to a Scotch Peerage no formal claim to the House of Lords is necessary; but it is absurd to

argue that this applies in a disputed case. The result of such an argument would be that, in every case of a Scotch Peerage, no patent for which existed, in the event of the holder dying, and his heir-male and heir-general being different persons, each of these persons might assume the title on different grounds, and no authority could dispossess either of them. Such is Lord Crawford's contention, carried to its logical conclusion; and, I confess, I cannot conceive anything more likely to cast ridicule on the Peerage of Scotland." Lord Kellie contrasts Lord Mar's conduct with that of Lord March in the Cassillis claim:—"The heir-female in that case was the Earl of March, who, like Mr. Goodeve Erskine, had assumed the title. The heir-male was successful; and the Earl of March, unlike Mr. Goodeve Erskine, acquiesced in the judgment, and dropped the title."

2. With respect to the character of "claimant," the "defeated claimant," "disappointed claimant," of the Earldom of Mar (the Earldom there spoken of being the original dignity, not the modern Earldom alleged to have been created in 1565) before the House of Lords, as persistently attributed to the heir-general in the Letter now before me, Lord Kellie writes as follows, and I am glad that I am thus enabled to place the facts he specifies before the reader in his own words, which will supply their best comment:—"Mr. Goodeve Erskine obtained leave to appear in opposition"—*i.e.* to Lord Kellie's claim before the Committee for Privileges; "and in his petition, and also in his printed case, styled himself Earl of Mar; but on this fact being brought to the notice of the Committee, he and his counsel were told that it was an improper assumption, and on his subsequently lodging an Additional Case, in which he was styled Earl of Mar, he was ordered to amend the style by inserting the words 'claiming to be' before the 'Earl of Mar.' On one occasion he personally appeared at the bar of the House of Lords without counsel or agents, when he persisted in styling himself 'thirty-fifth Earl of Mar.' But Lord Chancellor Hatherley informed him that he must see the extreme absurdity of admitting him as Earl of Mar, which was a fact to be proved. On Mr. Goodeve Erskine's still persisting that he was Earl of Mar, the Lord Chancellor said, 'You are under a foolish mistake; that is one of the misfor-

tunes of your not being advised. You may watch the case as a claimant.' On several subsequent occasions when Mr. Goodeve Erskine's counsel ventured to allude to him as Earl of Mar, they were interrupted by several law Lords, and informed that that style could not be allowed. At one stage of the proceedings, when a question was raised as to the proper mode of correcting the headings of the printed cases for Mr. Goodeve Erskine, in which he was styled Earl of Mar, Lord Colonsay suggested that he must underline the words 'claiming to be' before 'Earl of Mar.' The case then proceeded with Mr. Goodeve Erskine as a mere claimant." I may observe *en passant* that Lord Hatherley's words, "You may watch the case as a claimant," could not invest Lord Mar *nolens volens* with that character, which moreover implies a petition to the Sovereign, not the House of Lords, a fact overlooked throughout, alike by Lord Kellie and by all who call him a claimant; and it is matter of justice to point out that in the speeches of the noble and learned Lords, and the noble Lord who addressed the Committee for Privileges, as well as during the proceedings generally, he was spoken of as "the opposing petitioner," which was undoubtedly so far his actual character. The light, nevertheless, in which Lord Mar has been constantly spoken of by those who disallow his right, and pre-eminently so by Lord Kellie as above shown, is that of one defeated in a competition for the dignity with the latter, Lord Kellie,—a representation quite incorrect, and calculated to engender most unjust prejudice. It is not, as will be perceived, without cause that I lay stress upon these two points—Lord Mar's actual status in the eye of the law as Earl of Mar till a provision in favour of the heir-male shall be proved against him; and his having appeared before the House of Lords in defence of his hereditary rights as assailed by the heir-male, Lord Kellie, not as a claimant of them, and far less of the Earldom alleged by Lord Kellie to have been created in 1565.

The words in my two Protests bearing upon these two questions, and against which Lord Kellie's criticisms are directed, are as follows:—In the first Protest, lodged on the occasion of the election which followed first after the Resolution of the 25th February 1875, I wrote thus,—“John Francis Erskine, sister's son and heir-general of John Francis Miller,

late Earl of Mar, the grandson and representative of John Francis Earl of Mar, restored in 1824, having legally qualified himself as successor to his uncle in the dignity according to the form competent to the Peers of Scotland, and being thus legally in possession, and being in no possible way required to submit his right to the consideration of a Committee of Privileges under the circumstances above stated, is now *de jure* and *de facto* Earl of Mar by the laws of Scotland, reserved inviolate by the Treaty of Union, is on the preceding grounds alone entitled to vote . . . as Earl of Mar," etc. etc. And in my second Protest,—“He (Lord Mar) never claimed, nor was under any necessity to claim, a dignity of which he is in actual possession by the law of the land.” I have now to vindicate these assertions, and meet Lord Kellie’s objections, as above set forth.

1. On the first question, involving Lord Mar’s status as Earl of Mar from the period of his uncle’s death, and at the present moment, notwithstanding the Report of the House of Lords in favour of Lord Kellie, and the Order that followed upon it, hereafter to be dealt with, my answer must have been anticipated by every one who has read and appreciated the proofs given in the second of these Letters of the law of succession in Scotland. There is no distinction in the laws governing the descent of lands and honours, unless indeed this, that, while the possession of lands through hereditary succession must be legalised by certain forms of investiture, dignities pass at once to the heir *jure sanguinis*, without any intervention of the law being necessary. In the case of landed heritage, a maternal nephew, the next of kin, succeeds to his uncle, the latter dying without issue, as his heir-at-law, as a matter of course, unless he is excluded by settlement in favour of the collateral male heir; and a maternal nephew, the next of kin, succeeds to his uncle, the latter dying without issue, in his dignity in the same manner, unless excluded by charter, patent, or other writ, in favour of heirs-male. In both cases, and especially in dignities, it is open to the heir-male collateral to prove such exclusion of the heir-general in his favour, as constituting an exception to the course of the common law, by distinct and proper evidence; but till that is proved, the heir-at-law is in possession; and the doctrine of the indefeasibility of dignities,

familiar to English, is unknown to Scottish law. The difficulty of appreciating Lord Mar's position lies in the prejudice existing in the minds of many in favour of the exclusive male succession in dignities and estates. As I have more than once said, I share in it strongly myself; but, as matter of fact, as already shown, the rule and presumption of Scottish law is against it, although the law tolerates the exception; and we are thus compelled to admit that in the eye of the law a maternal nephew succeeding to his uncle in the way Lord Mar did to the late Earl, differs in no respect from a paternal nephew succeeding to his uncle in that capacity, as so many peers of Scotland have done in the natural course of succession by undoubted right and without question. It cannot be too strongly enforced, that the presumption of Scottish law is in favour of the lineal heir as against the collateral.

But, apart from the general law which determines Lord Mar's right, it must be remembered here that the question of the right of succession is *res judicata* in his case. The decret of 1626, coupled with the acknowledged fact that the Earldom of Mar was never legally resigned to a Scottish King for regrant with a limitation restrictive to heirs-male (the charter of 1426 being, as has been shown, illegal, null, and void), establishes the succession in the heirs-general, descending from Robert Earl of Mar, the heir-general of the Countess Isabel, and Lord Mar's direct ancestor. There exists nothing, therefore, to interrupt or hinder the immediate devolution of the dignity upon the heir-general in the person of Lord Mar, on the death of the late Earl. On the contrary, Lord Mar could not help himself—the dignity settled upon his shoulders as a mantle he could not legally shake off, even had he wished it. Moreover, the idea of the descendibility of the title to heirs-male as a new creation in 1565, had been actually repudiated by Lord Mansfield and Lord Camden in the Sutherland claim in 1771, when asserted by Sir Robert Gordon, as already stated. And, lastly, if the late Lord Mar's grandfather, John Francis Earl of Mar, restored in 1824, was not so restored in right of his mother Lady Frances, the King, the officers of the Crown, the Prime Minister, and the Houses of Parliament, all concurred in passing an Act the *ratio* of which was at variance with the actual status of the person whom it was intended to

benefit. Lord Mar, in fine, did simply, in assuming the dignity, what Scottish peers succeeding as heirs-general invariably did in former times, even although only remotely connected with the last possessor, law and usage invariably recognising the right of the heir-general till disproved by an heir-male. The case cited by Lord Kellie of the Earl of March, who assumed the title of Earl of Cassillis as heir-general on the death of the preceding Earl, a very distant relation, illustrates the usage. Lord March dropped the title, inasmuch as the Report of the House of Lords was in favour of the heir-male, and rightly so, although the advice tendered to that effect to the Committee (by Lord Mansfield at least) proceeded, as I have already stated, on erroneous grounds. Moreover, he had claimed the dignity by petition to the Crown, and in so doing may be held to have to a certain extent recognised the authority of the Crown to decide on his pretensions—although, of course, in conformity with law. But Lord Mar, to anticipate by a moment what I have next to state, has never been a claimant. The complication which Lord Kellie sketches, in the event of two competitors, the heir-male and the heir-general, assuming the same title on the succession opening to a peerage, the patent of which is lost and the destination unknown, and which he imagines would cast ridicule on the Scottish peerage, proceeds upon the fallacy that both would be equally entitled—or disentitled—to assume it; whereas (as will have already been seen) upon such assumption it would only be competent to the heir-general under the presumption of law; while it would not be competent to the heir-male collateral, and such assumption would be on his own responsibility. It might be advisable and consistent with self-respect for an heir claiming to succeed a peer to whom he was but very distantly related, to abstain from assuming the title till a declarator had been obtained in his favour from sufficient authority; but such could never be considered as a course proper to be observed in the case of a relationship so immediate and so indisputable as that of Lord Mar to his late uncle. The Earl of Rosebery in 1822 carried a Resolution in the House of Lords, that in the case of a nephew of a Scottish peer succeeding to his uncle, the nephew should not be allowed to vote as a peer till the House of Lords had determined that his right was good—a Resolution which

was distinctly *ultra vires* of the House, and which was rescinded at the instance of the Duke of Buccleuch in 1862, after having been found inoperative. If, therefore, to revert to an illustration above given, a paternal nephew thus succeeds and is recognised as a matter of course as heir to his uncle, a Scottish peer dying without issue, a maternal nephew being the next of kin, in Lord Mar's case, is equally entitled so to succeed and to be recognised, with all the privileges attendant upon such recognition, under the sanction of the law of Scotland above indicated.

2. Turning to the second question suggested by Lord Kellie's Letter, viz., In what character did Lord Mar appear before the House of Lords on the occasion of Lord Kellie's claim?—that character being, as he affirms, that of a claimant, an unsuccessful claimant. I have to remark that it is impossible to imagine a more fundamental error, or one leading to more cruel and unjust consequences, than that upon which this representation is grounded.

I have already quoted in part the remonstrance against this representation which I have made in my recent or second Protest at Holyrood. It is in full as follows:—"It is important, in fine, to observe that the present Earl of Mar does not stand in the position of an unsuccessful claimant of a dormant dignity. When the Earl of Kellie petitioned the Sovereign for recognition of his right to an Earldom of Mar, inferred to have been created in 1565, and the Sovereign referred his petition to the House of Lords for their opinion and advice, Lord Mar appeared in opposition to a claim which, although the dignity claimed was one of which he denies the existence, trenched nevertheless upon his right as tenant of the original and only Earldom of Mar. But he never claimed, nor was under any necessity to claim, a dignity of which he is in actual possession by the law of Scotland," etc.

What I have now to say must be prefaced by a reference to what I have already shown as to the limitation attendant on the intervention of the House of Lords in dignities, as laid down by Lord Chelmsford, following in the steps of older authorities, in the Wiltes claim; and as to the value attributable to the speeches of the noble and learned Lords who advise Committees for Privileges, and the restriction upon the ter-

minology of the Resolutions, as adopted by the House and reported to the Sovereign. Lord Mar's position before the House of Lords was and is this:—1. He has never petitioned the Sovereign for recognition of the dignity which he holds as vested in his person by law. 2. The Sovereign consequently has referred no petition on his part to the House of Lords—apart from which reference the House has no authority to act in any way in the matter. 3. Although the Earl of Kellie has claimed by petition to the Sovereign, referred by Her Majesty to the House of Lords under the conditions above indicated, an Earldom of Mar, it was expressly as a new creation in 1565, and distinct in every respect from the ancient dignity held by Lord Mar. 4. The Earl of Kellie having advanced this claim, Lord Mar petitioned the House of Lords—not for recognition of his own till then unquestioned right, but for leave to oppose a claim advanced in derogation of that right, and in aggression upon the unity and integrity of the one and only Earldom of Mar standing upon the Union Roll, and of which, as repeatedly stated, he was in legal possession. But by thus petitioning the House, Lord Mar in no sense compromised his status or conferred any right on the House to adjudicate upon that status,—he petitioned as Earl of Mar, being in legal possession, for leave to defend himself. I may remark that by Scottish law in any such case the Court of Session ordered the claimant or pursuer to summon parties who would be compromised by his success, to appear for their interest as matter of right; and in the same manner the House of Lords ordered the Sutherland claimant to summon the Earls of Crawford and Erroll to appear in opposition, lest their right should be compromised. It is an obligation incumbent on the House so to do, and the very fact of Lord Mar petitioning for leave, according to the modern usage, placed him at a disadvantage. When the Duke of Montrose was permitted to appear in opposition to my father in the Montrose claim, in 1853, on the ground that that the dignity claimed by my father was of the same name and style as his own Dukedom, the House might just as reasonably have treated him as a claimant as Lord Mar, the two Dukedoms being absolutely distinct; and the very foundation of Lord Kellie's claim being that the ancient and the modern dignity of Mar had no connection.

But, to proceed: It is true that the Committee for Privileges—assuming *ab initio*, under the influence of the traditional private rule of 1762, that the presumption in the succession to Scottish dignities is in favour of heirs-male and against the heirs-general—not distinguishing between the absolutely distinct characters of the real and the supposititious dignity—and not recollecting that when Sir Robert Gordon in 1771, standing on precisely the same ground as Lord Kellie, alleged that the Earldom of Mar was a new creation of 1565, Lord Mansfield and Lord Camden rejected the plea and founded upon the proved descendibility of the Earldom of Mar as one of the ancient Scottish earldoms so descendible, in favour of the Sutherland heir-general—disallowed Lord Mar's title, ordered him to expunge it from his case, and compelled him to appear before them as a commoner—and, instead of recognising the *onus probandi* as incumbent on Lord Kellie, claimant of the alleged new Earldom, transferred it to the shoulders of the actual tenant of the original dignity—the only Earldom of Mar recognised as in existence till that moment. But all this, and Lord Hatherley's words, "You may watch the case as a claimant," could not convert Lord Mar into a claimant, or derogate from his status as Earl. Lord Mar had to choose between appearing at the bar of the House of Lords in this degraded capacity, and bow to Lord Hatherley's rebukes, he being at that moment the most ancient peer in Her Majesty's dominions—and abandoning all defence of his ancestral rights. But those rights, rooted in the soil of centuries, and protected by law—and I must add once more, by the Treaty of Union—could not be legally compromised by such extrajudicial proceedings.

My answer to the two questions suggested by Lord Kellie is therefore as follows:—1. That Lord Mar can no more be other than Earl of Mar, than Lord Kellie himself can be other than Earl of Kellie; and being Earl of Mar, and the House of Lords having been invested with no authority to determine that he is not Earl of Mar, and the recent report on reference from the Crown having been exclusively confined to the claim to the alleged modern peerage claimed by Lord Kellie, Lord Mar is entitled to style himself, and to be styled by all others, without exception, by his proper title. And, 2. That never

having submitted his pretensions to the arbitrament of the Sovereign, but simply opposed Lord Kellie's claim as above shown—a claim to a dignity of which he denies the existence—he has never been, and is not now, in the position of a claimant, and no one has the right to call him so. The words “unsuccessful,” “defeated,” in Lord Kellie's Letter, add nothing to the gravity of the misrepresentation.

The fact is, that Lord Kellie and those who support his views proceed upon the impression that mere opinions expressed by the noble and learned Lords who advised the Committee for Privileges in 1875, to the effect that the original Earldom of Mar was extinct, amounted to a judicial or quasi-judicial declaration to that effect—although those opinions were never reported to the Sovereign, nor indeed could be, unless the Committee had been guilty of the same error and invasion of the prerogatives and of the liberty of the subject into which Lord St. Leonards betrayed the Committee for Privileges and the House of Lords in the Montrose claim in 1853, when he inserted at the last moment a clause in the Resolution in repudiation of, and in order to preclude, an alternate claim, which he apprehended the claimant might prefer to the Sovereign (but which he had not made), upon a grant entirely independent of that upon which he had already claimed—a proceeding *ultra vires* of the Committee and the House. The impression here remarked upon is a necessary consequence from the fatal error of representing the speeches of noble and learned Lords in Committees for Privileges as “judgments”—thus investing mere “opinions” with a judicial character which they do not possess. And yet it is on this theory alone that the orders issued by the House of Lords, already mentioned, as consequent upon the Resolution of 1875, and which will be discussed in the ensuing Letter, can be accounted for.

The law on this point as affecting claims to English dignities (and when Scottish claimants submit themselves to the English procedure, they are entitled to the protection afforded by it, and *a fortiori* in such a case as that of Lord Mar, who has never been a claimant) was laid down by Lord Chief-Justice Holt in the Banbury case in 1692, and is decisive.

The application of this well-known case is peremptory in

the present instance. The heir-general of the ancient Earldom of Mar, strong in his legal possession, has never claimed the Earldom in question by petition to the Crown. The Sovereign consequently has not referred such petition to the House of Lords. The House necessarily has had no such claim before it. And the denial of Lord Mar's right to appear as a peer in defending his right previously to the Resolution, and any action taken subsequently thereto in infringement of his right, is as nugatory in law as that taken by the House of Lords in the Banbury case—and *a fortiori*, inasmuch as it is matter of option to the claimants of Scottish peerages whether they submit their pretensions to the Crown or to a legal tribunal, which they are fully entitled to do by the Treaty of Union.

## LETTER XI.

## ORDER TO THE LORD CLERK REGISTER AND ITS RESULTS.

## SECTION I.

*Orders passed on Resolution of 25th February 1875.*

THE right of the Earl of Mar to style himself so, and to exercise the privileges attaching to the Earldom of Mar standing on the Union Roll, having thus been vindicated alike from the imputation of undue assumption on his part and the misrepresentation that he stands in the position of a defeated claimant, I resume the thread of narrative from the point where I interrupted it, viz., from the day on which the Resolution in favour of the Earl of Kellie was adopted by the Committee for Privileges. That day was the 25th February 1875; and on the very next day, the 26th, the House of Lords initiated a course of action which has been the basis of all that has since taken place—of Lord Mar's practical exclusion from his seat among the Peers of Scotland at Holyrood and of Lord Kellie's propulsion into it—the action so adopted by the House proceeding on the views expressed in Committee upon which the Resolution of the 25th February 1875 was arrived at, but which views form no part of the Resolution, and cannot be imported into it so as to authorise the House to act in prejudice of one who is not only no claimant, but is actually in legal possession of the original Earldom of Mar,—a dignity distinct from that claimed by Lord Kellie, and upon which alone the House was competent to advise the Sovereign in terms of the reference. The House of Lords has subsequently, as I shall show, disavowed the theory upon which the action I have now to set forth proceeded; but the action remains in force, the injury as yet unredressed. I proceed to narrate what passed on the 26th of February in Lord Kellie's own words:—

“This Resolution,” that of the 25th February, “was reported to the House and approved of on the 26th of February 1875, and the following Orders of the House were passed upon it:—

“Ordered, 1. That said Resolution and Judgment be reported to Her Majesty by the Lords with white staves.

“Ordered, 2. That the Clerk of the Parliament do transmit the said Resolution and Judgment to the Lord Clerk Register of Scotland.

“Ordered, 3. That at the future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar according to its place on the roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings of such election.’

“As,” Lord Kellie proceeds, “the returning officer appointed by Statute to act at the election of Peers, the Lord Clerk Register by himself, or by two Clerks of Session having commission from him, is bound by the Statute passed in 1847, under these Orders of the House of Lords, to receive my vote and to refuse that of any one else attempting to vote as Earl of Mar; so that the protests of Lord Crawford and other Peers are not of the slightest value, and only serve to interrupt that harmony which has hitherto prevailed at the election of Peers.”

Passing over Lord Kellie’s concluding assertion for the moment, I have to remark that the second and third of these Orders were alike irregular and *ultra vires* of the House, for these reasons:—1. They were issued prematurely, without due authority, and in disrespect to the Sovereign; and 2. The effect of the third Order in particular was to tamper with the Union Roll; and the House has no legal power to do so, either directly or indirectly. I do not know who was responsible for the Orders, or whether precedents can be alleged for one or both of them; but principle condemns them, and all that has followed upon them must share in this condemnation.

In the first place, the two Orders were issued by the House in the same breath with their approval of the Resolution and the Order that it should be reported to the Sovereign, but before the report had been made to the Sovereign, and without due authority, under an unwarranted assumption that the Sovereign would approve of the result. This was wholly irregular and *ultra vires* of the House. The intervention of the House is strictly limited by the condition of the royal reference, which reserves ultimate judgment for the Sovereign; and after reporting their Resolution, embodying their humble advice to the Crown, the House is *functus officio*, and no further action can be taken by the House or by any one else until the Sovereign has pronounced his award, after full inquiry and deliberation upon the advice thus tendered. Had the House issued these Orders after the Resolution had been simply received by the Sovereign, that would have been an irregularity; but so to act as it did, before that Resolution and Report had been sent up to the Queen, was not only to act without authority, but was inconsistent with that respect always manifested by the House for the supreme authority, and which it could only have overlooked in the present instance through some strong misconception of its power. In a word, the approval of the Sovereign came to be taken for granted. The word "judgment," coupled with "Resolution" in the first and second of the two Orders, has no judicial significance; but merely expresses the opinion tendered to the ultimate judge, as shown by Lord Chelmsford himself in his speech on the Wiltes claim, elsewhere quoted. The second and third of these Orders were thus issued in direct invasion upon the prerogative of the Queen, treating her practically as a nonentity in the matter. Her assent ought in no case to have been thus presumed upon, and least of all in the case before us, because she might have seen fit to demand explanation as to the grounds and merits of the Resolution, inasmuch as the law officers of the Crown, the Attorney-General and the Solicitor-General for Scotland, had expressed their conviction in addressing the Committee for Privileges on behalf of the Crown, that whether the original dignity of Mar was restored in 1565, or whether a new creation then took place, it mattered nothing, as the dignity was in

the former alternative descendible to heirs-general, and in the latter was intended so to descend—thus in no point of view descendible to the Earl of Kellie, the heir-male; while it followed necessarily from these premises, although the officers for the Crown did not travel beyond their prescribed tether, that the dignity under either alternative stood vested in the heir-general, Lord Mar, the “opposing petitioner” at the bar. It was further, under any circumstances, in Her Majesty’s option—a consideration wholly overlooked by the House of Lords, and by Lord Chelmsford in particular, on the 26th February 1875—to refer Lord Kellie’s petition back to the House for further consideration, or to take the advice of another tribunal and act upon it. According to the intimation in the original reference to the House, all they were empowered to do was to “examine the allegations” of the petitioner, and “to inform Her Majesty how the same shall appear to their Lordships.” The precipitancy of the Order tended in another direction to preclude remonstrance on the part of the actual tenant of the original dignity, the heir-general, Lord Mar, who would have been entitled to protest to Her Majesty against such unwarranted invasion of his right. But the ground was thus cut from under his feet. I have nothing to do with motives here, which were probably limited to the wish of quashing what may have appeared likely to prove a troublesome and unwarranted opposition. I deal simply with facts and their effect. It would be no answer to all this to allege that the provisions for justice at the foot of the throne, which I have appealed to, are obsolete; Lord Chelmsford did not consider them so when he advised the Committee for Privileges on the Wiltes claim; and, while the rights of the Crown cannot suffer from prescription, the provisions in question, difficult as it may be to enforce them, are the only security left for rights such as those I now defend, against the autocratic action of a body which otherwise would be, and is after all to all practical purposes, a Court of first and last resort in claims to dignities.

But, secondly, independently of this supersession of the authority of the Sovereign, irregular in course and *ultra vires* in action, and the attendant injustice to Lord Mar, the third of the above Orders was further *ultra vires* of the House, inas-

much as it proceeds upon an assumption that the House has legal power to ordain alteration in the precedence of the Peers of Scotland—in a word, as I have said, to tamper with the Union Roll. The Order in question intrudes Lord Kellie, as Earl of Mar under the alleged creation of 1565, into the place and precedence of the ancient Earldom of Mar, the only Earldom of Mar on the Union Roll, holding a precedence far above 1565, and actually occupied by another as entitled thereto and invested therein, not only *jure sanguinis* and under the law of Scotland, but by the Act of Reversal of Attainder of 1824, the recognition of the House of Lords in the Sutherland claim of 1771, and the decret of the Court of Session in 1626; an Earldom which Lord Kellie had not claimed, and which the House had not reported, or been licensed to report upon, to the Sovereign; but into which the Order in question thrust Lord Kellie, to the effect of extruding the lawful tenant (so far as acceptance of his vote was concerned), and giving the newly discovered Earldom of Mar in Lord Kellie's person the precedence over nine Earldoms, created between 1404 and 1565, and their representatives—the well-known principle being totally overlooked, that a dignity cannot be extinguished by indirect words, or by a side wind, even by an Act of Parliament; while the House of Lords had not been empowered by reference from the Crown to express even an opinion upon the existence or non-existence of the original dignity, far less to take action upon such opinion.

I have already shown in my seventh Letter that the House of Lords has no legal power to deal with the Union Roll; and I shall presently show that the House itself disclaimed such power subsequently to the issue of the Order here in question, thus admitting that this third Order was *ultra vires*, and therefore illegal. All that the House is at liberty to do, at least by custom, is to direct that a dignity dormant in 1707, or then held along with a superior dignity but since detached from it, shall, on its recognition by the Sovereign as existing in a claimant, be inserted in its proper place on the Roll, and the vote of its tenant received. This is what might have been done in the case of Lord Kellie with regard to the supposed Earldom of 1565, had the existence of that dignity and its descendibility to male heirs been legally established; and why

this was not done has never been explained. But the Order attempted more than this,—to extinguish the original Earldom, and establish the new one in its place; they committing the error of vaulting ambition in overleaping itself, and coming to grief on the other side.

## SECTION II.

### *Proceedings at the Election of 1876.*

The effect of the Orders of the House of Lords, thus far noticed, and especially of the second and third Orders, made itself felt at the first election of Scottish Representative Peers which took place after the Resolution upon Lord Kellie's claim, and which was held at Holyrood on the 22d December 1876. The proceedings on this occasion were of singular importance and interest; and I shall give them, although abridged as much as possible, from the full report published in the *Scotsman* of the 23d December 1876. They are well worth attention, as illustrating the practical effect of the Orders of the 26th February 1876, and bringing into prominence all the popular prejudices attendant on the subject. The scene was not without its dramatic character. The heir and tenant of the ancient Earldom of Mar, Earl of Mar by Scottish law, and the claimant of the supposed creation of 1565, Earl of Mar according to the House of Lords, met in opposition, as claiming to vote in the character of the Earldom, not of 1565 but of 1404, the former under all the disadvantage attendant on the apparent position of a defeated claimant imposed on him by the House, yet not without a few Scotch peers who sympathised with his position, and vindicated his right; the latter, in the blaze of success, and supported by one whose influence has long been predominant at Holyrood, but whose justice is such, that nothing but confidence in the infallibility of the House of Lords could have induced him to take the part he did on the occasion; a part, I may observe, of moderation, as compared with that of others also present. The lead in opposition was taken by the Marquess of Lothian, Lord Elphinstone, and Lord Saltoun. The Lord Clerk Register presiding was Sir William Gibson-Craig.

The proceedings opened by Lord Lothian calling attention to the fact "that there was a gentleman sitting at the table,"—

the seat occupied by the peers on the occasion of such assemblies—"who, he thought, had been declared by a decision of the House of Lords to be a commoner." This was Lord Mar, who attended in his place to vote at the election. The Duke of Buccleuch remarked that it was not usual for a person who was a claimant to a title to take his seat with those who possessed a title, "although the question of sitting in one chair or in another was immaterial." The Lord Clerk Register, who presided officially at the meeting, stated, "that as far as he was judicially concerned, he could not recognise the gentleman referred to in any shape or form, except as a commoner. Lord Elphinstone moved that Mr. Goodeve Erskine be requested to leave the table before the proceedings were commenced. The case in which that gentleman was concerned had been decided by the House of Lords. He was therefore a commoner; at any rate, he was not a peer of Scotland." Lord Saltoun seconded the motion.

The motion having been thus put and seconded, "Mr. Goodeve Erskine," I use the words of the report, rose, and "craved indulgence for a few minutes to make a single statement. He believed he was right in taking it for granted that the remarks which had fallen from several noble Lords must apply to him, because a name was mentioned which was his own name; but he took leave, with all respect and deference for their Lordships' views, to venture to correct a little mistake that had been perhaps not very unnaturally fallen into. Since his uncle, the last holder of the old title of Mar, died, he had been in the habit of voting at these elections as a Peer." The Lord Clerk Register here interposed, "No, no; certainly not." But Mr. Goodeve Erskine, in continuation, "said his votes had been recorded in previous years under protest; his vote had been received, and on one occasion it caused a tie between Lord Kellie and Lord Rollo. The matter was reported to the House of Lords, and his vote stood. He begged to state that there had been no adjudication by the House of Lords, or any other tribunal, against his right. The adjudication in favour of the Earl of Kellie was simply that he was entitled to enjoy the Peerage of Mar created in 1565. To that dignity of perfectly modern date he, Mr. Goodeve Erskine, was happy to say he laid no claim; and, until a solemn adjudication had been

passed against his rights, he protested his right as a peer of Scotland, not dispossessed, to take his seat at the table." Mr. Goodeve Erskine was proceeding to read a formal Protest, when the Lord Clerk Register, interrupting, said, "This was extremely irregular. He knew one Earl of Mar, and only one. The honourable gentleman," his Lordship continued, "has had his case before the House of Peers, and that House has decided against him; and I cannot hold that he is entitled, as Earl of Mar, to have any appearance here at present." Lord Mar upon this called the Lord Clerk Register's attention to the Resolution of the House of Lords in favour of Lord Kellie, in which he said, "I am confident you will find there is no adjudication against my right; I say that with all deference to your Lordship as a high official. There has been no adjudication against my rights by the House of Lords, or any other Court in the land; and if any other person can prove his right to the old title, the only title standing on the Union Roll, let him come forward and prove it." The Lord Clerk Register rejoined by citing what he described as "the decision of the House of Lords," but which was in reality the Order of the Committee for Privileges, to the effect, "The Committee are of opinion that the petitioner may be allowed eight weeks' further time to deliver in his printed case, and that the title of the appeal should be amended by striking out therefrom the words 'claiming to be Earl of Mar.' You can," added his Lordship, "appeal to the House of Lords as Mr. Goodeve Erskine, but the House of Lords will not receive your appeal if made in the name of the Earl of Mar." Lord Mar pointed out that this "decision of the House of Lords" was an entirely different document from that which he had referred to, viz., the Resolution and Report of the Committee for Privileges, 25th February 1875. "May I ask," he said, "the date of the paper your Lordship has just read?" *The Lord Clerk Register*.—"23d April 1875." *Mr. Goodeve Erskine*.—"Exactly so: the adjudication in favour of the Earl of Kellie being allowed to represent the comparatively modern title of Mar, dated 25th February 1875; and by that adjudication Lord Kellie may be perhaps entitled to a modern Earldom, but he certainly has no right to, and never claimed, the old Earldom of Mar which I represent. And further, I make no claim to that old Earldom, by the advice of

my counsel, being already in possession." "It does not signify," replied the Lord Clerk Register, "whether the Earl of Mar on the Roll has obtained the other title or not; you have not established your right to it"—(*Mr. Goodeve Erskine*.—"Excuse me")—"and till you have established your right you cannot be received here."

After some further discussion, the Marquess of Lothian called attention to the motion made and seconded, "that Mr. Goodeve Erskine should be requested to withdraw,"—that being the question before the meeting. "As to the question whether the gentleman who appears as claimant of the Earldom of Mar—" *Mr. Goodeve Erskine*.—"Excuse me; I am not a claimant of what I possess." *The Marquess of Lothian*.—"The gentleman who claims to sit as Earl of Mar can have his claim put in later when the title is called: but the question now before us is, Whether the gentleman sitting under the name of Goodeve Erskine should be allowed to remain at the table or not?" I give this painful narrative with much reluctance, but it is necessary to trace causes in their consequences; and the general misconception of Lord Mar's position, and the injustice with which he was treated by the Lord Clerk Register and certain of his brother peers at Holyrood on this occasion, were the immediate consequences of the Order of the 26th February 1875.

At this point of tension Lord Napier intervened, by suggesting that Mr. Goodeve Erskine should not be requested to leave the table till "the Earl should claim to vote, and should his vote be negatived, it would then be time to ask him to leave the table." The Duke of Buccleuch reiterated his opinion that the question "whether Mr. Goodeve Erskine sat at the table or not was very immaterial"—"it was a question of taste" (he added) "on his part." Mr. Goodeve Erskine then said he asserted his right as a peer, not dispossessed of his ancient right, to sit at that table as a Peer of Scotland; but if it was left to his good taste whether he should sit or not . . . he would stand behind the chair." He took his place accordingly. "A lady" (the report proceeds) "sitting behind him offered to vacate her chair in his favour, but he said he should on no account dispossess a lady; and the matter was adjusted by his resuming his own chair, slightly drawn back from the table."

When the title of "Earl of Mar" was called, both "Mr. Goodeve Erskine" and the "Earl of Mar and Kellie" rose and answered to the call; and the close of the scene was as follows:—"The Lord Clerk Register, addressing Mr. Goodeve Erskine, again informed him that he could not recognise him in any way except as a commoner. He had to ask him to sit down. *Mr. Goodeve Erskine*.—In deference to your Lordship, if it is agreeable that I should sit rather than stand, I will sit with pleasure; but I assert my right once more to appear as a Scotch Peer and answer to the title. *The Lord Clerk Register*.—You understand, I express no opinion as to whether you have a right to the Earldom of Mar or not. I simply stand on this ground, that you petitioned to be created" [*sic*] "as Earl of Mar, and that the House of Lords has rejected your claim. *Mr. Goodeve Erskine*.—Nothing of the kind, most emphatically"—(cries of *Order!*)—"I beg your Lordship's pardon; I am sorry to express myself so abruptly. I never petitioned the House of Lords to be created anything at all." The Lord Clerk Register closed the discussion by saying, "I cannot have the proceedings interrupted by a person who is not entitled to be present."

At this stage, the question being the reception of the vote of the Earl of Mar and Kellie, or of that of "Mr. Goodeve Erskine" as Earl of Mar, in answer to the summons of "Mar" on the Union Roll, various Protests were lodged against the right of Lord Kellie to vote in that character. As already explained, the Order of 26th February 1875 commanded the Lord Clerk Register to receive and count the vote of Lord Kellie as "Earl of Mar" under the alleged creation of 1565, which is not on the Union Roll, in the place of the Earldom of Mar actually standing on the Union Roll, and which has precedence over the Earldoms of Menteith, Rothes, Morton, Buchan, Glencairn, Eglinton, Cassillis, Caithness, and Moray—all created previously to 1565. The Order thus struck directly at the rights of precedency enjoyed by these Earls. In consequence of this, the Earls of Morton, Cassillis, and Caithness protested by formal and separate instruments, and in the same words in each case, against the Earl of Mar and Kellie "answering to the title of Mar which stands on the Union Roll of Peers, and voting before me, as he has no right to the said title of Mar on the Union Roll, but only to a title of Mar recently

found by the House of Lords to have been created in 1565, which creation gives his title of Mar rank below me." These protests were on behalf of special and personal interests; but others grounded their remonstrance upon general grounds. The Marquess of Huntly entered a protest of this nature, and much to the point, against the acceptance of Lord Kellie's vote in right of the "title of Earl of Mar which stands on the Union Roll of Peers, as he has no right thereto, but only to a title of Earl of Mar recently found by the House of Lords to have been created in 1565; and if the said . . . Earl of Mar and Kellie should, notwithstanding of the objection hereby made on my behalf, insist on answering to the said title of Earl of Mar standing on the said Union Roll as aforesaid, I do hereby protest against his so doing, and for remeid of law at a fit and proper time." Moreover, Lord Napier, acting on grounds equally disinterested with those of Lord Huntly, objected by a similar protest, on the ground that the Earldom of Mar on the Union Roll "stands on the said Roll with a precedence of more than a century earlier than the title of Earl of Mar affirmed by the House of Lords to have been created in 1565, and adjudicated to the Earl of Kellie on February the 25th, 1875; and should the vote of the Right Honourable John Francis Erskine Earl of Mar, hitherto received at the elections as that of the representative of the ancient Earldom of Mar on the Union Roll be tendered and be not received, I further object to the rejection of the said vote, and protest for the reasons set forth in the protest of the Earl of Crawford and Balcarres." The protest to which Lord Huntly thus honoured me by expressing his adherence, and which was put in on the occasion of this election, is the first of the two Protests which form the subject of Lord Kellie's criticism in the Letter addressed to the Peers of Scotland, now before myself and the reader.

The Lord Clerk Register observed, after receipt of my Protest, that the protest being "against the Earl of Mar" (*i.e.* the Earl of Mar and Kellie) "voting at this election, he had no choice but to obey the Order he had received from the House of Lords, and which was perfectly clear and distinct"—this being the third of the series of Orders passed on the 26th February 1875. The Duke of Buccleuch observed, with perfect propriety, that "the peers could not go into all the questions

raised" by the Protest. "This was a meeting for purposes of election, not for purposes of deliberation as a court. They could only be guided there by a decision of the supreme Court, viz., the House of Lords"—an attribution of jurisdiction which I, of course, dissent from—"and he did not think they should gain anything by going into the details of things which must be decided by that House, and could not be decided by them." It would have been well if this advice had been attended to at the subsequent election, when I lodged a second or Additional Protest. The Duke was perfectly right. But he did not apprehend, I suspect, the *ratio* and object of protests, which are formal appeals, it may be said, to posterity, in the ancient formula used by Lord Huntly, "for remeid of law at fitting time and place," when the grounds of such protests may be insisted upon in the interests of justice, when the hand that has signed the formal document has perhaps mouldered into dust. Any discussion upon such *rationes* at meetings for election purposes at Holyrood is simply gratuitous on the part of those who take part in it. The Lord Clerk Register receives the protest—it is recorded in the Minutes—it stands there as a landmark of remonstrance, voiceful for centuries, and a groundwork for legal proceedings, as I have elsewhere shown, in the Supreme Court of Scotland, which is not the House of Lords, but, as I have elsewhere shown, the Court of Session.

The Protests of the Marquess of Huntly and of other noble Lords on behalf of Lord Mar having thus been received, Lord Mar, or, as he was styled, "Mr. Goodeve Erskine," rose and asked leave to read a Protest in his own behalf. The Lord Clerk Register again requested him to sit down, affirming, "You have no right to appear." But Lord Mar insisted, in eloquent words, in defence of his right. "I maintain my right," he said, "to appear as a Peer of Scotland, not in any way dispossessed of my ancient rights through a new title being conceded to the Earl of Kellie of an entirely different date and line of succession"—Lord Mar, I may observe, overlooking the fact that by Scottish law he himself, and not Lord Kellie, would be Earl of Mar under the creation of 1565, had such ever existed. To the question of the Lord Clerk Register, "How is that protest signed?" Lord Mar replied, "By my right and proper signature; by the name of the title I have the honour to inherit

from my uncle and the Earls of Mar for the last thousand years, independently of a new title dated 1565. Lord Kellie's new title of 1565 is not on the records of Scottish history, and is nowhere affirmed; there is not a single document in support of it; it rests entirely on the Resolution of the House of Lords, formed on a report from the Committee of Privileges saying that, without writing or evidence of any kind, they presume this new title to have been created in 1565, limited to the heirs-male of the Erskine family, though the old title of Mar was not held through Erskines at all. I claim my right as a Scotch Peer to put in my Protest, with all deference to your Lordship's views; and I put it to the noble Lords present whether I may not be allowed to read my own Protest. The learned advocate has had the indulgence of your Lordships in reading three or four; and I think I am not asking too much in asking to be allowed to read my own Protest in this supposed-to-be free country."

Lord Elphinstone and Lord Saltoun then addressed the meeting, the former protesting "against Mr. Goodeve Erskine reading any Protest. There was," he said, "but one Earl of Mar. One Earl of Mar was forfeited in 1715; one Earldom was restored in 1824. The case was before the House of Lords very recently, and was decided by the Peers, who were unanimous in saying that the ancient Earldom was extinct"—(*Mr. Goodeve Erskine*.—"No, no!")—"and had been extinct for 130 years before the new title was created by Queen Mary. If confirmation were required, it was afforded when Mr. Goodeve Erskine appealed against the judgment of the Court of Session claiming the Mar estates." (This was in further allusion to the process between Lord Mar and Lord Kellie, the former claiming the estates as standing on the settlement of 1739 and the missing back bond, but which was given against him by the First Division of the Court of Session, after which he appealed to the House of Lords, who confirmed the judgment.) "Pending the trial," continued Lord Elphinstone, "he was allowed to append to his name Goodeve Erskine, 'claiming the Earldom of Mar;' but after the decision on the peerage case, their Lordships ordered these words to be struck out. If further confirmation was required, he should call attention to the fact that whereas Mr. Goodeve Erskine had been presented at Court as Earl of

Mar, after the decision of the House of Lords was given, the Lord Chamberlain, in his official capacity, cancelled the presentation of Mr. Goodeve Erskine as Earl, and of Mrs. Goodeve Erskine as Countess of Mar." I have spoken of this comparatively petty matter elsewhere; but *ultra vires! ultra vires!* is stamped upon all these dealings. The House of Lords has subsequently repudiated the idea that in recognising an Earldom of Mar of 1565 as in Lord Kellie, it affirmed the extinction of the ancient Earldom of Mar, as urged against "Mr. Goodeve Erskine" at Holyrood and elsewhere.

Lord Saltoun, following up Lord Elphinstone, added that "there was no doubt that the origin of all titles of honour was the Crown, and they must partake of the nature of the Crown in so far that the representative of a title should be a single person. If they admitted two Earls of Mar, why not admit a dozen; why not two Kings or two Princes of Wales? The thing was an absurdity." (It is hardly worth while stopping to comment upon this.) "They had now before them the decision of the House of Lords, desiring them [?] to admit an Earl of Mar, and designating that Earl of Mar who he was. They could not admit two Earls of Mar, because it was impossible that there could be two Earls of Mar at the same time in the kingdom. Therefore they must obey the House of Lords, and nobody else could have a right to call himself Earl of Mar."

The conversation closed by Viscount Stormont (Earl of Mansfield in the British Peerage) observing that "he remembered that some years ago Colville of Ochiltree made a claim before the House of Lords to vote. That claim was refused, and it was established that he had no right; but he appeared at a Peers' election and made a statement in regard to his claim, and entered a Protest, which was accepted by their Lordships. They had no power," he added, "to give any opinion as to the merits of this case, which must rest entirely with the House of Lords; but there was one fallacy which had fallen from his noble friend (Lord Saltoun), that it was impossible there could be two peers of one name. It so happened that at this moment he was in England Earl of Mansfield and Earl of Mansfield by two separate creations."

Lord Saltoun explained that he "meant in the same rank."

I need scarcely add that no serious objection can be raised on such a point.

The conversation then dropped. But I shall have an observation or two to make on other points, especially on Lord Elphinstone's speech, before closing this Letter.

Lord Mar then repeated his request that he might put in his Protest. The Lord Clerk Register replied that "he must stop this discussion. If," he continued, "you sign that Protest with your own name, I will receive it; if you sign it as Earl of Mar, I cannot recognise it. I do not express any opinion whether or not you have a right to be Earl of Mar; but you must establish that right. At present you are only a peer of your own creation, and that creation I cannot recognise here."

Lord Mar then reverted to the point which he had previously raised, based upon the following facts, which appear to have passed from the remembrance of all present except the Duke of Buccleuch—Lord Mar himself having (as it seems to me) but an imperfect appreciation of their importance. The facts are briefly these:—The House of Lords, at the instance of the then Earl of Rosebery, passed a general Resolution on the 13th May 1822, ordering "that no person, upon the decease of any peer or peeress of Scotland, other than the son, grandson, or other lineal descendant, or the brother of such peer, or the son, grandson, or other lineal descendant of such peeress, shall be admitted to vote at the election of the sixteen peers," etc. etc., "until, on claim made on behalf of such person, his right of voting at such election or elections shall have been admitted by the House of Lords,"—or, in simpler words, that no heir-collateral succeeding to a Scottish peerage more remote than the brother of the deceased peer shall be permitted to vote until he shall have proved his right before the House of Lords,—the contingency of the son of such a brother, or the son of the younger sister of a peeress dying without issue, succeeding to a dignity, being overlooked, and, in fact, excluded from the exemption *ex terminis* of the Resolution, so as hardly to fall within the possibility of being included constructively therein. It was not only an outrageous Resolution, in aggression upon the rights of Scottish peers as subjects governed by the laws of Scotland, protected by the Treaty of Union; but, as a general Resolution of the House affecting dignities

and the privileges of peers, it was, like many other similar Resolutions in former times, simply *ultra vires*, and, as such, illegal. It proved abortive, as was confessed by the Select Committee of the House "relative to Scottish Representative Peers," in 1847, in the following words:—"The House, by their Resolutions of 1822, attempted to prevent the intrusion of all persons claiming to vote by collateral succession without due authority; but these Resolutions have proved inoperative, even in many cases of this description, and wholly so with regard to those who claim by lineal descent." The Resolution, nevertheless, remained on the books of the House for forty years longer, a standing menace, till it was rescinded on the motion of the Duke of Buccleuch on the 25th July 1862, and matters restored to their former state. Lord Mar would appear to have been under the impression that the Lord Clerk Register was acting against him under Lord Rosebery's Resolution, which, strictly interpreted, might have created a practical impediment in his case as sister's son to the deceased Earl of Mar; and he therefore appealed to the Duke of Buccleuch's own Resolution in proof that no such impediment existed since 1862. With this explanation what followed will be intelligible.

In reply to the objection of the Lord Clerk Register, that he must establish his right as Earl of Mar before he could be recognised as such at Holyrood, Lord Mar rejoined—"By a Resolution of the Duke of Buccleuch on the 25th July 1862, it is not necessary to establish one's right before appearing at the election." "That," replied the Lord Clerk Register, "is not my opinion." "I should very much like," Lord Mar replied, "to see a copy of the Resolution,"—this being the second time he had asked for it; but, passing over this, the Lord Clerk Register insisted, "All I can say is, that any person appearing here to vote must satisfy me he has the right to act as he proposes. I can decide upon that,—it is my duty." Lord Mar once more asked: "May I see the Resolution of the Duke of Buccleuch?" to which the Lord Clerk Register rejoined, "If you sign that Protest with your own name, I will receive it." Lord Mar replied, "I will sign with the name of Mar, the name I inherit from my ancestors for a thousand years. Will you allow it to be entered on the Minutes that my protest has been

presented?" The answer was, "It will be recorded that a protest was presented, but not received." It was accordingly rejected.

The Duke of Buccleuch then rose and said, "That as several references had been made to him, as having moved that it was not necessary for a peer to prove his right to his title before voting at these elections, he should make that perfectly clear. By a Resolution moved by the late Lord Rosebery a great many years ago, the House decided that no peer succeeding to a peerage as a collateral should be entitled to vote until he had proved his right to the peerage. There were several Resolutions of different kinds passed by the House of Lords, but they were conflicting and inconvenient, and were not effective." I say, they were *ultra vires* and illegal. "He" (the Duke of Buccleuch) "certainly moved that this Resolution be rescinded, and nothing more than that. He did not move any Resolution as to the necessity or non-necessity of a peer proving his right and title."

The proceedings, so far as they affected the Earldom of Mar, closed with a speech of the Lord Clerk Register, containing suggestions of what I must be allowed to style a very dangerous character, and the fruits of which may not perhaps be yet come to light. "The Protests," he said—those, namely, of Lord Huntly and others, "had been received, but they could only be received, because it was impossible for him to act upon them. He was directed to call the Roll of Peers as it had descended from the time of the Union, and to the order of precedence in that Roll he must adhere. He had no means of judging whether the Earl of Mar should hold the place he had on that Roll. Five or six other peers might say they had precedence of him, but Lord Mar might dispute the right of any of these peers to be on the Roll at all; and if he (the Lord Clerk Register) was to decide the case, he must try the position of every peer who had been put above the Earl of Mar. (A laugh.) This was a very important matter; and he had to make a suggestion, which he hoped would be followed out. The Roll of the Peers of Scotland had twice been formally settled—once in 1606, and again in 1707 or 1708, at the time of the Union,"—a manifest error,—“and it had come down from that time as the recognised Roll of Peers. Many changes

had taken place upon it, and they had had disputes in regard to precedence,"—a word, I must observe, too strong,—protests merely "for remeid of law" in the proper region of "dispute," not the House of Lords but the Court of Session. "The Duke of Sutherland, for example, had protested election after election that he should be called as the first Earl." So, the Lord Clerk Register might have added, have the successive Earls of Mar since 1639. "These Protests had been received, but, of course, no notice could be taken of them"—that is, by the Lord Clerk Register or the Peers, the remedy to be applied being by the Court of Session, which acted accordingly in the *Sutherland v. Crawford* claim to precedency in 1746; "but he thought the time had come when it would be well that the Peers of Scotland should have a committee appointed by the House of Lords to re-adjust the Union Roll. (Applause.) This would save a great deal of trouble at elections; and he thought that so many changes had taken place that it was quite right and proper that an authentic Roll should now be used on such occasions. In the meantime, as he had no right to alter the place of the Earl of Mar on the Roll, he simply received the protests, which would be forwarded to the House of Lords, but no further proceedings taken on them,"—this last statement being, of course, wholly gratuitous, as it depends on those protesting whether or not they choose to initiate proceedings upon their protests in the quarter competent by the law of Scotland.

I shall revert to these observations of the Lord Clerk Register in a future page.

The calling of the Peers then proceeded, and nothing calling for remark here occurred till, on the summons of the Earl of Breadalbane, a lady, styling herself "Regina, Dowager Countess of Breadalbane and Holland," tendered a protest, signed by her said title, on behalf of her son, styled "sixth Earl of Breadalbane and Holland," then absent in Africa, against the reception of the vote of "Gavin Campbell of Glenfalloch, claiming to be Earl of Breadalbane,"—this being the successful claimant on the death of the late Marquess. "The lady," the report states, "in handing in her protest, said her son's vote had been received in the House of Lords. The Lord Clerk Register intimated that the Protest should be received."

Lord Mar made tender of his vote at the proper time, but it was rejected. "The calling of the Roll being concluded, the Peers were requested by the Lord Clerk Register to hand in signed papers intimating the votes they wished to give. In the course of the voting, Mr. Goodeve Erskine tendered his vote in support of Lord Borthwick and Lord Balfour," *i.e.* Lord Balfour of Burleigh,—“again submitting, in reply to the Lord Clerk Register, that he did not require to establish his claim to that which he was in possession of by right of birth. His voting paper was, however, returned, the Lord Clerk Register declining to recognise it.”

I have narrated the proceedings at this election of 1876, as given by the able journal referred to, without comment, except through such incidental remarks as were necessary in order to explain passing allusions or correct important inadvertencies. It is impossible not to feel that the Lord Clerk Register was placed in a very difficult position, through no fault of his own. He stood, as it seems to me, between conflicting responsibilities, of which the more remote and cogent appeared undefined to his perception, the situation being in fact unprecedented; and between these responsibilities he adopted the proximate one, that of obedience to the Order of the House of Lords, 26th February 1875, commanding him to allow Lord Kellie to vote as Earl of Mar in the place of the Earldom of Mar on the Union Roll,—an Order admitting of no hesitation or question. and practically substituting the vote of the heir-male under the supposed creation of 1565, which has no place on the Roll, for the vote of the heir-general under the Earldom actually standing there, to which Lord Kellie never made any claim, but into which he was thus propelled, *nolens volens*, as by the wand of a conjuror in a pantomime. Whether a prior obligation did not require the Lord Clerk Register to disallow this Order as proceeding *a non habente potestatem*—the House having acted in unwarrantable anticipation of the approval of their Report by the Sovereign—is a different question; but it is pretty certain that he was aware of no such obligation, and I do not think the objection of *ultra vires* which I have thus urged had been mooted at that time. The plain and practical difficulty in his path was this, which I have expressed in the 8th *ratio* of my second or Additional Protest, that as the

Committee of Privileges has no "authority to assign a place in the Union Roll to the Earl of Kellie," . . . "the Lord Clerk Register cannot, in the discharge of his ministerial duty, assign him one;" and this must remain as a stumbling-block in the path of the late Lord Clerk Register's successor. I have only to observe, in conclusion so far, that in a subsequent debate in the House of Lords, which I shall detail presently, Lord Cairns seemed to throw a doubt upon the propriety of the conduct of the Lord Clerk Register when, referring to the Order to the Lord Clerk Register to call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland, he said, "Whether that means according to the place of a peerage created in 1565, or whether it means to leave the Lord Clerk Register at liberty to judge for himself of the Earldom may be, I do not stop now to inquire. That is a matter which must be considered in some other form, and cannot be decided upon the Resolution now passed by your Lordships' House." But I cannot see the justice of this reflection, nor its propriety or generosity as proceeding from the mouthpiece of that House of Lords which issued the Order upon the plain and obvious sense of which the Lord Clerk Register acted.

### SECTION III.

#### *Observations on the foregoing proceedings.*

I would submit the following special observations in terminating this narrative of the proceedings of the election of 1876.

In the first place, one and all of those who took part in the discussion, including Lord Mar himself, assumed or allowed that the House of Lords had jurisdiction in dignities as a court of justice—even the Duke of Buccleuch describing it as "the Supreme Court—viz., the House of Lords—with power of decision, which decision must be obeyed,"—in absolute oblivion of the prerogative and function of the Queen as the ultimate, indeed only judge, and of all the attendant sanctions restrictive upon the intervention of the House of Lords in dignities, which Lord Chelmsford had so distinctly laid down, conformably with known principles, in his address to the Committee for Privileges in the Wiltes case; while they further

overlooked the fact that it is only by the allowance of claimants to Scottish dignities that their claims come before the Crown at all; and it is through their confidence in the justice and equity with which they take it for granted those claims will be considered that they adopt the English instead of the Scottish procedure in the development of such claims. Nothing of all this ignorance and oversight could have existed except through a losing sight of the fundamental laws governing the right to peerages, more especially of Scotland, which I have exhibited in the second of these Letters.

Again, the Lord Clerk Register, the Duke of Buccleuch, and almost every one else present at Holyrood, insisted that Lord Mar had been a claimant before the House of Lords, and an unsuccessful claimant; and this notwithstanding Lord Mar's clear and incontestable representation that the claim decided—or rather the claim preferred to the Sovereign, referred to the House of Lords, reported upon to the Sovereign, but never to this day (so far as I am aware) decided by the Sovereign—had been that only of Lord Kellie; that Lord Mar himself had never claimed the imaginary Earldom of 1565, much less the Earldom on the Union Roll, of which he was already in possession,—and that no “adjudication” had passed as against himself. This insistence on the part of the Lord Clerk Register and others arose from inadvertence, or from disregard of the fact that the House of Lords can neither offer an opinion nor take any action in regard to the right to a dignity, unless the question of that right has been brought before them by reference from the Crown of a petition to the Crown praying for recognition of the dignity; and that when they express such opinions or take such action *proprio motu*, it is *ultra vires*, and such as the courts of law disallow, as in the Banbury case in 1692,—always distasteful to the House, but which nevertheless rules on the point in question—so far, that is to say, as Scottish claims pass by reference before the House of Lords. In contradiction to the assumption thus protested against, it will be seen in the ensuing Letter that the Report of a Select Committee appointed by the House of Lords to consider the question of the Earldom of Mar in 1877, distinctly recognises the fact that there has been no decision against the heir-general of Mar, and that consideration and decision upon his

right under the original Earldom (as distinct from that of 1565) is still open to him, if he elect to adopt the course pointed out in that Report,—and this, I apprehend, is sufficient to prove that Lord Mar was right in all that he urged on this point before the Lord Clerk Register and the assembled peers. And if he is justified by the testimony of the House of Lords itself, how much does not the view of the question urged against him at the election need justification?

I have further to remark, that Lord Mar did less than justice to himself and his cause, in so far as he admitted—although such admission in such a discussion in nowise binds him in any way, and certainly not his friends—that a veritable Earldom of Mar, dating from 1565, and descendible to heirs-male, had come into view through the recognition of the House of Lords, and that this Earldom was vested by the decision of the House in the Earl of Kellie. This admission arose from the impression, so inveterately maintained, that the presumption in cases where no patent exists had been settled by the House of Lords, by the Cassillis Resolution of 1762, to be in the heirs-male of the body of the original grantee. But I have shown that this rule, so frequently styled “Lord Mansfield’s law” was *ultra vires* of the House, as being in the teeth of the Scottish law of succession, protected by the Treaty of Union, which affirms and enforces the absolute contrary of the proposition, and which the House of Lords is bound to follow and impotent to disallow. And the officers of the Crown had themselves affirmed the truth and repudiated the error in their address to the House on the 16th June 1874, pointing out that it mattered little under which creation the Earldom of Mar standing on the Union Roll existed, because the descent would in neither case be to the heir-male, Lord Kellie, but, conversely, to the heir-general. This exposition was repudiated by the noble and learned Lords who advised the Committee in 1875, standing on Lord Mansfield’s law—a foundation of sand, insufficient to support the superstructure they have reared upon it.

Finally, I have to point out that if the two Orders, and especially the third Order, of the 26th February 1875, were *ultra vires* of the House, as I have shown they were, for reasons given, the whole proceedings at the election of 1876,

so far as Lord Mar was concerned, were equally *ultra vires*, and as such illegal, and can infer no prejudice to his rights or those of the Scottish peers as involved in his person. The man to be pitied in the proceedings thus characterised was undoubtedly the Lord Clerk Register, who was put in the position of being compelled, as the mouthpiece of the House of Lords (for so he considered himself), to enforce an Order, to which he repeatedly appealed as imperative on his obedience. But painful as the scene must have been to those who knew that Lord Mar was one of themselves, and cruel as was his position and treatment, yet in another point of view, the man really to be envied in that august assembly was most certainly Lord Mar, who, under most trying circumstances, with scarcely half a dozen to sympathise with and support him, stood up to defend his inheritance of receding centuries and the rights of the Scottish Peerage—if not by an appeal to ultimate principles, on grounds, at least, which the acknowledged limitations upon the action of the House of Lords and the prerogative of the Crown stamp with sufficiency. Having entered his protest—verbally indeed, his written protest as Earl of Mar being rejected—Lord Mar has abstained from further appearance at Holyrood. It is for those who acknowledge and have done justice to his rights to vindicate those rights in the future.

I might have added to the preceding remarks, that no one present seems to have had any idea of the peculiar character and force of the protests entered at the meetings at Holyrood for the election of Scottish Representative Peers. These protests are in sequence to those entered in Parliament before the Union, and which were received by the Order of the House of Lords of 12th February 1708 in full validity, as elsewhere shown; and in sequence too to the protests executed on a thousand occasions in old Scottish history, “for remeid of law at proper time and place,” *i.e.* before the supreme court of law in Scotland, the Court of Session, to which every Scottish subject is entitled to resort for redress in matters of dignity no less than in ordinary civil causes—and indeed with more marked specialty and significance. So far from being of the empty character attributed to them by the Lord Clerk Register, and “not of the slightest value,” as Lord Kellie qualifies them

in his Letter to the Peers, they are of very substantial weight and efficacy.

As already said, I reserve such observations as I may wish to make on the suggestions of the Lord Clerk Register with respect to the Roll of Scottish Peers for a future Letter.

## LETTER XII.

## RESOLUTION AND DEBATE REGARDING THE UNION ROLL.

I HAVE now to chronicle a still further and the latest stage of development in the Mar question, a motion and a debate in the House of Lords, and the Report of a Select Committee appointed in consequence of that debate to consider that question, the result of which not only affects the rights of that ancient earldom, but brings the question between the law of the land and the assumption by the House of Lords of autocratic power with regard to peerages into such pronounced and absolute antagonism, that it can only be through a wise and prudent reconsideration of their position that the House can escape (so far as I can see) from the inevitable consequences of a collision.

I must preface my report and criticism by a brief narrative of the circumstances out of which the debate and what followed upon it originated.

## SECTION I.

*The Duke of Buccleuch's Resolution.*

The election at Holyrood had taken place on the 22d December 1876; the minutes of the proceedings, including the Protests lodged by myself and others, had been transmitted in due course by the Lord Clerk Register to the House of Lords; and non-official reports of what took place had been circulated through the country by the press. Lord Kellie and Lord Redesdale, the Chairman of Committees, each of them determined to take notice of what had passed, although on distinct grounds—Lord Kellie as affecting his own position as affirmed by the House of Lords and impugned by Lord Mar; Lord Redesdale, in order to prevent a recurrence of Lord Mar's

interposition, but also, as I infer, on broader grounds. Lord Kellie accordingly addressed a Petition to the House of Lords, which was presented by the Duke of Buccleuch on the 5th April 1877; and the noble Duke gave notice of his intention to move a Resolution in conformity with it on the 21st instant. The motion was not brought forward, however, till the 9th July, when a debate took place, resulting in the withdrawal of the Resolution, and the appointment of a Select Committee "to consider the matter of the Petition of the Earl of Mar and Kellie presented on the 5th of June 1877, and the precedents applicable thereto, and to report thereon to the House." The Select Committee presented their Report (entitled) "On the Earldom of Mar," on the 27th July, in which they recommended a certain course of action to be adopted in the event of a claim to vote being made by the heir-general at any subsequent election. Lord Mar, under advice, has not offered to vote at any election that has since been held; and no change in the situation has thus occurred. It will be seen hereafter on what grounds Lord Mar has been thus advised.

The march of events arising out of the election of 22d December 1876 and culminating in the Report of the Select Committee having been thus sketched as from a distance, we may now approach nearer, and mark the aspect and character of those events and the personality of the actors with a closer scrutiny.

The Petition of the Earl of "Mar and Kellie" addressed to the House of Lords prayed that their Lordships "may be pleased to order and direct that the Lord Clerk Register of Scotland or the Clerks of Session officiating at the elections of Peers of Scotland shall, at all future elections of Peers of Scotland, call the title of Earl of Mar on the Roll used at such elections in the precedence declared and established under the resolution and judgment of this Right Honourable House; and that the title of Earl of Mar may not hereafter be called at such elections in any other place,—your petitioner by this prayer to your Lordships not desiring or seeking to obtain for himself a precedency to the prejudice of any other peer, nor in any manner to disturb the ranking of any of the peers who may now have precedence above him." It will be recollected that by the Order of the 26th February

1875, directing the Lord Clerk Register to receive the vote of Lord Kellie as Earl of Mar when that earldom was called in the ascertained order of precedence on the Union Roll, a precedence was given to an earldom, asserted to have been created in 1565, over seven other earldoms created during the century previous to that date. The tenants of three of those dignities protested against this invasion of their rights; and I myself, supported by the Marquess of Huntly and Lord Napier, protested on behalf of all the peers and dignities, actually enjoyed or dormant, thus aggrieved. Neither Lord Kellie nor those responsible for the Order of the 26th February 1875 can be supposed to have been aware of the effect the Order would produce in this respect; and Lord Kellie took the course of a man of honour as well as of good sense in disclaiming any wish to profit by the inadvertence, and petitioning for relief from the embarrassing position in which he was placed by its consequences. The prayer of the Petition was in other respects tantamount to a proposal that the Union Roll should be altered by the excision of the original Earldom of Mar, ranking from 1404 (or, by the acknowledgment of Lord Redesdale, from at latest 1457), but which Lords Chelmsford, Redesdale, and Cairns assumed in their speeches to be extinct, and by the interpolation of the newly-discovered earldom of 1565 under this latter year,—the alteration in question to be effected by the authority of the House, which was assumed to be sufficient; while the fact that the date of 1565 was specified in the Resolution of 1875 as that of the creation of the earldom recognised as in Lord Kellie, was construed in the Petition, and subsequently represented by Lord Redesdale in the House of Lords, as a formal declaration and establishment by the House of the precedence which the dignity in question was henceforward to hold upon the Roll, and which therefore the House was empowered to imprint upon that document. The Petition was grounded upon the allegation “that the decision given by the House,” *i.e.* the Resolution of the Committee for Privileges of the 25th February, confirmed by the House on the 26th, “was an unanimous decision; and that all the noble Lords who gave judgments in favour of the Resolution expressed decided opinions that there was no other dignity of Earl of Mar in

existence than the one created in 1565." The first clause of this allegation may pass without observation; but the second suggested the searching question whether the opinions expressed in the speeches of noble and learned Lords addressed to a Committee of Privileges are, as they have been lately and officially styled, "judgments;" or whether they are merely *obiter dicta*, entitled to the respect due to those who utter them, but no more—as, in fact, I have already shown to be the case in an early Letter of this series. It was obvious to Lord Kellie's advisers that if the *obiter dicta* in question could be imported into the Resolution of the 25th February, the Resolution itself would not only affirm the new and independent creation of 1565, but the absolute extinction of the original earldom; and a reasonable ground could thus be pleaded for the operation on the Union Roll sought for by the Petition. The Report, it may be added, of the Select Committee, gave no countenance to the views and arguments thus set forth. Passing over the anxiety of Lord Kellie to be relieved from his post of pre-eminence over the Earls created previously to 1565, the Committee discover a less generous motive latent in the background. Their words are:—"Although the Petition of the Earl of Mar and Kellie prays that the title of Mar may be hereafter called in the precedence established under the Resolution of the House, that is, as an Earldom created in 1565, and not in any other place, yet it is obvious from the Petition that what the petitioner desires is that Mr. Goodeve Erskine should not be allowed to answer to the title of Mar wherever it may be called, or to tender his vote." This, it will appear, neither the House nor the Select Committee were willing to sanction on the bare terms of the proposal.

The effect of Lord Kellie's appeal to the opinions expressed in the speeches, and of Lord Mar's reply thus given, was necessarily to compel a declaration from the law Lords and the House as to the quality and character of the opinions declared in the speeches in question, and to determine, in a word, whether these speeches constituted "judgments" in the sense recently attributed to them. The friends of Lord Mar and the Scottish Peers generally ought to be extremely obliged to Lord Kellie and the Duke of Buccleuch for having thus elicited an authoritative statement of the sense of the House on the grave

questions affecting their intervention in dignities thus brought before them.

The Resolution moved by the Duke of Buccleuch on the 9th July in furtherance of Lord Kellie's Petition was in the following words:—"That this House doth order that at all future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peers of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating in his name, do call the title of Mar in the Roll of Peers of Scotland called at such elections, in the place and precedence to which it has been decided by the Resolution and Judgment of this House on 26th February 1875 to be entitled, according to the date of the creation of that earldom, and in no other place, with a saving, nevertheless, as well to the said Earl of Mar and Kellie as to all other Peers of Scotland their rights and places upon further and better authority showed for the same."

Lord Redesdale's views as to the expediency of intervention by the House of Lords in terms of Lord Kellie's petition and by means of the Duke of Buccleuch's Resolution were expressed as follows in his speech in the ensuing debate. I cite them here in order to clear my report of that debate of everything not directly bearing upon the main topics upon which the debate proceeded. After expressing his regret that the original Order of the 26th February 1875 had not been expressed in the form proposed by the Duke of Buccleuch's Resolution, and in answer to the question, "Why is it done now?" Lord Redesdale proceeded: "Why is it done? On account of the scene of confusion and trouble which took place at the last peerage election in Scotland; when a person came in who had been declared and adjudged by this House not to be Earl of Mar, and voted as Earl of Mar"—or rather, I must interpose, offered to do so, but was denied his right to vote and treated as an intruder; while the declaration and adjudication against him asserted by Lord Redesdale existed solely in the noble Lord's impression that the speeches of Peers in Committee for Privileges amounted to legal judgments, and were thus to be understood as incorporated into the Resolutions of the House reported to the Sovereign. "Under these circumstances," *i.e.* of "confusion and trouble," Lord Redesdale proceeded, "it became

necessary that the House should take care that that circumstance should not recur again; and therefore it is proposed that the House should come to a Resolution that the Earl of Mar shall be called in the place which was adjudged to him, and not be called in any other place, there being no person who has shown any right to be called in any other place." The Duke of Buccleuch's motion was thus intended, by Lord Redesdale's frank admission, to serve a double purpose: to relieve Lord Kellie and confirm his position, and to bridle the freedom of action of Scottish peers at the elections at Holyrood in revival of the control exercised, or rather attempted to be exercised, over those elections during the last century; although the difference of times is indicated by the fact that it was now attempted to do by a Resolution that which was then attempted by marching a company of soldiers into the court of Holyrood House to overawe deliberation.

I have now to remark that the noble Duke's Resolution, as originally placed on the notice-book, ended with the words "and in no other place," the parallelism which existed between Lord Kellie's Petition and the Resolution ending there—the words of salvo, beginning "with a saving nevertheless," etc., being the result of an afterthought. These words are not perhaps very clear; but they were understood by the House as denoting an impression which had been gradually gaining ground, not only in the Earl of Kellie's and the Duke of Buccleuch's mind but in that of Lord Redesdale, during the period intervening between the 5th April and the 9th July, that there might be some risk of going too far, that it would be prudent as well as just, to qualify the concession asked for by Lord Kellie by a provision saving any rights which might after all be hereafter found to exist in the heir-general under the original Earldom of Mar. It is dangerous in the warfare of sword and spear to make a change in the front of the line of battle in face of the enemy; but in the bloodless conflict between antagonistic rights in the lists of Themis such changes are imperative on men of honour when they detect a flaw in their own reasoning, or discover that they are in danger of committing cruel injustice in the unguarded exercise of power. The change of front in the present case betokened coming defeat on the main point of Lord Kellie's petition and the Duke

of Buccleuch's Resolution ; but Lord Kellie and the Duke were, I am convinced, too honourable and just to hesitate for a moment as to the course they should pursue. Lord Redesdale himself, more slowly and reluctantly, appears to have acquiesced in a similar conviction, and given it equally frank expression, even before the debate of the 9th. In his speech, already cited, he added words, not quite consistent indeed with those I have quoted, but which testify to this :—"And now, if Mr. Goodeve Erskine wants to come forward and make good his claim to the Earldom of Mar, and if he can adduce evidence that will satisfy the House that he is entitled to what he claims, the House must give it a very different place from that in which the Earl of Mar stood upon the Roll, namely, of the date of 1457"—which Lord Redesdale insisted was the proper date of the precedence recognised by the Decreet of Ranking, although erroneously whether as respected the original Earldom or the Earldom of 1565. "He" (the heir-general) "could not come in in that place," *i.e.* 1457, "for he had no claim to come in in that place. He must come in at a very much earlier period, which is what is meant by all those who talk about this very ancient title of the Earl of Mar." These latter observations touch upon the question of the Decreet of Ranking, which I have already dealt with, and need not here recur to. What is of importance at the present moment is the fact that Lord Redesdale's reference to "Mr. Goodeve Erskine," and the admission that the ancient earldom may be still existing although dormant, are in accordance with the saving clause at the close of the Duke of Buccleuch's amended Resolution, and in similar correlation with the doubts recently felt which suggested the justice and expediency of such a salvo. Lord Redesdale, I may add, had expressed a similar view in a letter to the *Times* of the 6th July 1877, in answer to a paper of my own on the subject of the Duke of Buccleuch's projected motion, published in that journal on the 2d July 1877, in which letter, after expressing his former conviction that the original earldom was extinct, he wrote :—"The Resolution proposed by the Duke of Buccleuch only gives the necessary instruction to the Lord Clerk Register in accordance with the decision of the House, following all precedents in such cases"—but none of which, it afterwards appeared, could be produced

—"and in no way prevents Mr. Goodeve Erskine establishing his right to the ancient Earldom of Mar at some future time, if he can find evidence to prove it." Messrs. Grahame and Wardlaw, Lord Kellie's agents, I may also remark, wrote in a letter printed in the same number of the *Times* as Lord Redesdale's, and also in comment upon my own paper, as follows:—"The supposed rights of Mr. Goodeve Erskine are in no manner whatever affected by the Petition which our client has presented to the House of Lords. The late Earl of Kellie and his son, our present client, successfully petitioned the Queen to admit their right to the dignity of Earl of Mar, and they respectively based their claims on the ground that the existing peerage of Mar had been created by Queen Mary in 1565 in the person of the then Lord Erskine, and that the ancient dignity of Mar had been attached to the landed earldom and had been extinguished when that earldom was broken up in the fifteenth century. These claims were opposed by Mr. Goodeve Erskine, who, by his Petition to the House of Lords in opposition, brought his case directly under the jurisdiction of the House,"—a novel and ingenious mode of reducing Lord Mar to the position of a claimant, but which I do not perceive to have found acceptance elsewhere. . . . "On the 25th of February 1875, . . . the House decided that Queen Mary's act was not a restoration but a new creation, and that our present client, the present Earl, as the heir-male of the grantee, was entitled to that dignity. The Petition recently presented only seeks to give full effect to that decision of the House. . . . The Decreet of Ranking, drawn up in 1606, is extremely imperfect and incorrect, . . . the place adjudged to the Earl of Mar is as erroneous, according to Mr. Goodeve Erskine's contention, as it is inconsistent with the decision of the House of Lords. . . . Our client is certainly justified in seeking to have the ranking amended, as it is wholly inconsistent with any place which can possibly be due under any hypothesis to the Earldom of Mar. Mr. Goodeve Erskine therefore cannot be prejudiced by any Order which can be made on this Petition; as, if he could establish any right to the ancient Earldom of Mar, his title would, according to the ordinary practice of the House, be inserted in its proper place in the Roll of the Peers of Scotland." It appears to me but justice to Lord Kellie to

cite these observations in connection with Lord Redesdale's, as showing that he participated with the noble Chairman of Committees and the Duke of Buccleuch in these newly awakened convictions—a fact which would not otherwise appear, no official utterance having taken place on his part subsequently to the presentation of his Petition. The result is that, whereas Lord Kellie and his adherents had strenuously maintained that the original earldom was extinct, and adjudged to be so by the Committee for Privileges in 1875, up to the presentation of Lord Kellie's Petition and the notice of the Duke's motion in its original form, without the salvo, they had become conscious previously to the debate of the 9th July that the question of the survival of the ancient earldom was still an open one ; and their anxious endeavour thenceforward was to reconcile the prayer of the Petition for an alteration of the Union Roll with that admission. Nothing, I repeat, but the claims of truth and justice pressing on the minds of honourable men, could have induced such a concession.

I cannot overlook the fact, that in his recent Letter to the Peers Lord Kellie insists once more that the "Judgment" of 1875 extinguished the original dignity. His words are :—"Not only was the Resolution unanimous, but the grounds of judgment as given in the speeches of the three noble Lords were identical, namely, that the ancient title of Mar was extinct, and the existing title was created by Queen Mary, and limited to heirs-male." It is quite possible that Messrs. Grahame and Wardlaw may have written this letter apart from Lord Kellie's consent, or that Lord Kellie himself may see the question now in its former light. But the fact stands out that the view of this particular question—the absolute extinction of the original earldom under the report of 1875—was departed from in the manner I have above shown by Lord Kellie's most active friends previously to the debate of 9th July 1877. The fact, which will shortly be pointed out, that the House of Lords fully recognised in 1877 that the question whether the original earldom was extinct or not is still an open one, seems to have escaped Lord Kellie's recollection when he wrote the Letter to which the present series of Letters is my reply.

## SECTION II.

*Debate of 9th July 1877.*

Having thus taken estimate of the views and attitude of the principal persons concerned, I proceed to the great debate of the 9th July 1877. I call it "great," inasmuch as, short in duration, and passing almost without observation, as most turning-points do in history, it determined—taken in connection with the Report of the Select Committee which sprang out of it, and the adoption of that Report by the House—the attitude of the House of Lords for at least the present generation, as to the extent and limitation of its powers of intervention in relation to Scottish and indeed all peerages, the House retracing its steps towards a juster appreciation of its powers in some most important matters, but in others plunging still deeper into what I cannot but consider a quagmire of error and confusion. It may assist the reader in his perusal of what follows, if I notice among the favourable points a repudiation by the noble and learned advisers of the House of all power of legislation apart from the other House of Parliament and the Sovereign; and among the unfavourable, the arrogation to the House of a right of jurisdiction over peerage claims and rights, in absolute oversight, and I think I may say exclusion, of the Sovereign, and of such a character as to constitute the House of Lords in this class of claims a Court of first and last instance, without appeal, and practically a Star-Chamber. The repudiation of the right of independent legislation must be credited to a strong sense of constitutional obligation on the part of the noble and learned Lords who addressed the House. On the other hand, the arrogation of exclusive jurisdiction in dignities cannot be imputed solely to the deliberate impulse of their personal convictions, but to the autocratic traditions of the House, transmitted from the English House of Lords before the Union, but which were never hitherto thus formally crystallised; and to their honest and unquestioning acceptance of an Act of Parliament passed in 1847 in an unguarded moment, which appeared to them the only means of escape from the embarrassment into which the report upon Lord Kellie's claim and the Order of the 26th February 1875 had betrayed them.

I shall show, in fact, that the Act of 1847 is in itself unconstitutional and illegal, which, moreover, cannot be brought to bear upon the case of Lord Mar, inasmuch as his case does not fall within its provisions.

The first part of the debate was taken up by speeches of lay peers interested in the Mar case—among whom I must of course include the noble chairman of committees, Lord Redesdale, who stood forward as the special exponent of the views which the House was called upon to assent to and enforce.

The Duke of Buccleuch opened the debate in support of his Resolution in his usual simple and manly way, representing it as carrying out then what is usually done “at once” after the decision in favour of a claimant, viz. the sending an Order to the Lord Clerk Register to “insert the peerage according to its proper place on the Roll.” He alleged various instances of this having been done, and described the Resolution as praying that the Earldom of Mar “may be placed on the Roll according to the date assigned by the judgment of the House, *i.e.* 1565,”—“that it may be called according to the precedents of former times, in the place to which the Resolution of 1875 says that it is entitled, ‘according to the date of its creation, and in no other place.’” He called attention to the saving clause which had been added to the original Resolution, observing that “this would not interfere with any other peerages which are in existence or may be created,”—a word which probably escaped the noble Duke instead of “recognised,” as we have seen in the speech of the late Lord Clerk Register at Holyrood, above given. “If,” he concluded, “any gentleman claims the ancient Earldom of Mar, and can prove his title to that peerage, there is nothing to interfere in any way whatever with his doing so.” The noble Duke spoke in strong depreciation of the Decreet of Ranking and the Union Roll, the Decreet not being final, and the Union Roll neither embodied in the Act of Union nor to be found in the Treaty of Union. I need say nothing myself here upon this point.

The Duke was followed by Lord Huntly. He observed that the instances mentioned by the Duke were all of peerages being added to the Roll, and none of peerages being struck off, as the Resolution proposed to do in the case of the ancient Earldom of Mar; and it would be *ultra vires* for the House to

strike a peerage off the Roll. "This Resolution proposes to strike the old Earldom off the Roll, and to call the Earl of Mar in his new place; in fact, it puts a fresh earldom upon the Roll, but it also allows another Lord Mar, if he likes to come to your Lordships' House, to claim the ancient Earldom. You might have Lord Mar coming to this House next year and claiming to be put back according to the Decreet of Ranking upon the Union Roll, as dating from the year 1457." The Resolution, Lord Huntly added, "affects very deeply every member of the Scottish Peerage. . . . They are a very small and limited body at the present time. . . . To strike off any peer dating from the fifteenth century, . . . and substitute in its place a modern peerage, . . . would be contrary to the spirit which ordinarily governs your Lordships," would be "contrary to precedent," and *ultra vires*.

Lord Redesdale followed, with his usual energy. In abridging these speeches, I keep, as I have stated, to the main points upon which the House, through the law Lords, Lord Selborne and the Lord Chancellor Cairns, declared their opinion, and which are involved in the acceptance by the House of the report of the Select Committee. "The House," said Lord Redesdale, "has come to a resolution which has been submitted to the Crown as to the placing of the Earldom of Mar," this being the Resolution of 25th February 1875, reporting in favour of Lord Kellie's claim; and I may observe that this reference to the Crown as an ultimate authority is the only one throughout Lord Redesdale's speech. "The petition of the noble Earl is that the House shall, according to the custom in all cases where a date has been assigned to a peerage of Scotland, order the Lord Clerk Register to call the peerage as of that date. That is a matter perfectly within the jurisdiction of the House. It has been done on numberless occasions; and it is the reasonable and the only right course to be pursued in the matter."

"The noble Marquess," proceeded Lord Redesdale, "says that we are asked by this Resolution to strike a peerage off the Roll. The Resolution does nothing of the sort; it only says that a peerage shall not be called as of a certain date; and why? Because it has been most clearly proved that there is no peerage of that date in existence. There never was an Earl of Mar

sitting in 1457." This is a little inconsistent with the admission that "Mr. Goodeve Erskine" could still claim that peerage before the House of Lords. "It is a thing that we cannot very clearly understand or comprehend certainly, but the Committee for Privileges inquired into the matter, with evidence before it which was never brought before the Commissioners who framed the Decreet of Ranking, or any other tribunal,"—a rash speech in presence of the Decreet of 1626—"and determined that the first Lord Erskine who ever sat as Earl of Mar took his seat upon a particular date" (that is in virtue of a new creation on a particular date), namely 1565. That was the Resolution of the Committee for Privileges, and that was the award of the House, and that has been the Order of the House.

Lord Redesdale then referred to the burning question of jurisdiction, with especial reference to my own remonstrance on the subject, originally set forth in my first Protest, and once more in the memorandum which I had written in April, which had been circulated by Lord Mar's friends, and which was printed in the *Times* a few days previously to the debate.<sup>1</sup> "Now what is really," asked Lord Redesdale, "the ground which has been taken up? Look at that statement which appeared in the newspaper from a noble member of this House. As he is not here" (I was absent at the time), "I may mention him—the Earl of Crawford. What is the distinct ground upon which he goes? It is that this House has no jurisdiction to determine anything about Scotch peerages. Is the

<sup>1</sup> My words were: "My belief is that the House has no legal power to deal with the Union Roll by way of excision or correction; but even if they have, compliance with the second part of Lord Kellie's prayer would be absolutely *ultra vires* on their part, on the ground of one of the fundamental maxims of peerage law and practice, as controlling the action of the House of Lords in matters of peerage. Lord Kellie grounds his request on the statement, 'that all the noble Lords who gave judgment in favour of the Resolution expressed decided opinions that there was no other dignity of Earl of Mar in existence than the one created in 1565.' But such opinions, however decided, amount to nothing unless they are formally embodied in the Resolution; and the conditions under which they can be so embodied are distinct and precise. The House, having no original or inherent jurisdiction in dignities, and acting merely as advisers of the Sovereign, the ultimate judge, is incompetent even to express an opinion, much less to pass sentence, or take action upon the right of a man to a dignity, or upon a dignity abstractly, which right and dignity are not before them for consideration, by reference from the Sovereign on petition by a claimant; and

House going to submit to such a principle, or to admit such a claim as that? This House has always held, and properly held, that it is the only tribunal to determine the right to a peerage." (I do not know whether Lord Chelmsford, who laid down the law so lucidly in the Wiltes case, was present on this occasion, but if so he made no sign.) "The proposal of the noble Marquess, namely, that upon this question, which is a simple one according to order and precedent, the House should be held to declare that it has no jurisdiction in the matter, seems to me, my Lords, to be one of the most extraordinary propositions that ever was made.

"Then the noble Marquess says that this Resolution would order a peerage to be put back. It amounts simply to this, that having found the peerage to be of a particular date, we order the peerage to be called as of that date. There was another claim put forward by a person who did not nominally come forward as a claimant, but as an opponent, and that was that the earldom did not date from 1565, but from a much earlier period. He could, however, show no ground for it, and the decision was that that was the only date of the Earldom of Mar. And why? Because from the time when the last heir-male died in 1377, down to 1565, there was no person sitting as Earl of Mar who could claim in any way whatever to have any descent from the ancient Earls of Mar. The House came to the conclusion, therefore, and naturally, that there was a new creation at the time when the first of the Erskines came in.

if such unwarranted opinion be hazarded, the Courts of law take no notice, and act, if necessary, independently of it. The law on this point, as laid down by Lord Chief-Justice Holt in 1694, is decisive. . . . The application of this well-known case is peremptory in the present instance. The heir-general of the ancient Earldom of Mar, strong in his legal possession, has never claimed the earldom in question by petition to the Sovereign; the Sovereign consequently has not referred such petition to the House, the House necessarily has had no such claim before it. The only claim before it has been that of Lord Kellie to a totally distinct and modern earldom, stated to have been created in 1565, against which claim the heir-general appeared in opposition in defence of his right under the original creation, etc. The result is that the question of the original Earldom has never been referred to the House by the Queen—has never been before the House in such a manner as to justify them in pronouncing an opinion upon it, much less in taking action upon it; and as the House has no original jurisdiction or power of interference, it acted *ultra vires* in issuing the Order which worked such injustice at the late election, and will act *ultra vires* now, if it issues any Order upon the second portion of the petition of the Earl of Kellie, granting its prayer."

But I do not enter into the question whether that decision was right or wrong; it was the decision of the House. The only thing that is now asked of the House is, in accordance with that decision, to order the name to be called in the place which that decision has given to it."

Passing over the expression of Lord Redesdale's regret that the Order now sought for had not been made two years ago, and referring to the "scene of confusion and trouble" at the recent election, which rendered it "necessary that the House should take care that that circumstance should not recur again," and to the opportunity still open to the heir-general to come forward and make good his claim, Lord Redesdale concluded as follows:—

"Now, my Lords, looking at the objections which have been raised to the proposal of the noble Duke, I do not see how it is to be met. It certainly has not been met yet. I should like to know what grounds there are which could justify the proposition of the noble Marquess that this House has no right to order a Peerage which is found on the Roll at a particular date to be called at another date. What objection can any man take to the Resolution by which that is proposed to be done? It seems to me that the natural consequence of the Resolution to which the House came in 1875—namely, that the placing, and the only placing, of the Earldom of Mar was in 1565—is that it must be called in that place, and that to call it in any other place is improper. I defy anybody to find any good reason for saying that the places of the peers on the Roll can never be altered, and that therefore the House cannot, upon further inquiry and upon fuller evidence, come to the conclusion that the placing of the Earldom of Mar at the date of 1457 was wrong, and that it ought to be called in another place. That is all that the House is asked to do. It is asked to act in accordance with the Resolution which it came to in 1875 as to the place in which that Peerage should be called, and at the same time to order that it shall not be called in another place, because no one else has proved, and I believe no one is capable of proving, that it ought to be called in another place."

[The concluding sentence of the noble Earl, in resuming his seat, was not audible.]

The last of the lay Peers to speak was Lord Mansfield, the lineal heir and representative, I may interpose, of the Lord Scone who was one of the Commissioners of 1606, and to whom the task, *inter alia*, of defending the Decreet of that year was naturally appropriate. After stating that there were precedents for peers being put higher up on the roll of Peers, but none for their being put in a lower place, he took notice of the Duke of Buccleuch's description of Lord Kellie and Lord Mar as "rival claimants," pointing out that Lord Kellie had claimed an Earldom of Mar totally different from the ancient one to which Lord Mar had succeeded in the usual course of law. "He still," said Lord Mansfield, "retains his Earldom of Mar, and every Scottish peer in this House is in exactly the same position. The noble Duke and every other peer of this House knows perfectly well that in Scotland you have not to go through any form or ceremony whatever—you are merely retoured heir to your peerage, and you take it; you do not come to this House for it. It is in that position that the Earl of Mar stands at the present moment: and, although in the first instance he was opposed by the late Lord Kellie, who claimed to be Earl of Mar of 1404, that claim was dropped, and his son took up the position that he imagined a peerage, or somebody imagined it for him, of the year 1565, and the Committee for Privileges came to the conclusion that he had proved his claim to a peerage of 1565, but they never said one word about the peerage of 1404; therefore that peerage remains intact at the present moment."

Lord Mansfield proceeded to criticise the decision of 1875 as "a most extraordinary one, because it was a decision that there was a peerage of 1565 which nobody had heard of before, and which has no scrap or tittle of evidence of any kind to support it. There is no patent or document of any kind which can be produced to prove that there ever was that creation in 1565." Lord Mansfield made a further observation, which I add, inasmuch as it answers to a certain extent Lord Redesdale's assertion, that the Committee for Privileges in 1875 had evidence before them which would have altered the ranking in 1606 had the Commissioners of that year been aware of it. "The whole foundation of this supposed creation in 1565 rests upon a very curious matter. There is a letter from a man of

the name of Randolph, who, as your Lordships will remember, was employed between Queen Elizabeth and Queen Mary. In the postscript of that letter he says that the Earl of Mar was made on such and such a day—the day before the marriage of Mary and Darnley. My Lords, I have looked through the evidence given upon this claim, and I find that that letter was struck out—that it was not allowed to appear in evidence; and Lord Chelmsford said (I beg the noble Lord's pardon, I did not know that he was in the House, or I should not have named him)—he said, 'This is mere gossip,' and 'the evidence had better be rejected.' That letter having been rejected by the Committee for Privileges, it is rather a curious thing that my noble friend the Chairman of Committees, in giving his opinion" (that is, in his speech in support of the Resolution 25th February 1875) "refers to it as that which decides the whole matter." This criticism, I may interpose, substantially correct, requires a few words of supplement, to render it absolutely so.

Lord Mansfield touched upon the important point—in my opinion, the vital point—although it made no impression upon the law Lords, that "when the House comes to a Resolution of this kind, they generally" (I should have said "invariably, as in duty bound") "report to the Queen, and take the Queen's pleasure upon it; but it is a very curious thing," he observed, "that that very night the Order was sent down—whose doing it was I do not know—to the Lord Clerk Register to insert the name of the Earl of Mar in the Roll at the date of 1565."

Lord Mansfield then vindicated the character of the Decreet of Ranking of 1606 as "one of the most solemn Decreets that ever was passed," pointing out, moreover, the essential fact that the test of the precedency prescribed to the Commissioners was the production of whatever evidence each several peer could find to establish his right. "The only thing the Commissioners could do was to fix the ranking according to the documents produced;" while a reservation was made in the Decreet, by which a peer not ranked according to his proper place through deficiency of evidence might be enabled to recover it (as I have elsewhere shown), by process before the Court of Session, upon whose decreet the roll could be amended—"not that any other peer should be able to put him down lower, but that he might

be able to put himself up higher." "We all know," observed Lord Mansfield, "that the old Earldom of Mar is the most ancient in Scotland, but the Lord Mar of 1606 was not able to prove that, because the old charter was lost. However, Selden, in his book of 'Titles of Honour,' mentions the Earldom of Mar as being the oldest that was known, and says that he had seen the original charter granting the Earldom. This charter was lost, but, curiously enough, it is said to have been found quite recently, in the course of a search for other papers, at Lincoln's Inn. The original charter of the Earldom of Mar of 1090" (it should have been stated of 1171, although not the original creation) "is said to have been found. Whether it has or has not, I cannot say, for I have not seen it; but it is evident that it is possible that the case may arise of an Earl of Mar claiming the title of Mar as of the date of 1090, because, by a provision in the Decree of Ranking, the Earl of Mar would be able to go up higher, although no peer can be put lower." I have already spoken of the charter of 1171, and need not recur to the subject.

"Now, my Lords," the noble Lord continued, "that being the case, what is the proposition which is made at the present moment by the noble Earl on my right? He proposes that you should strike out the Earldom of Mar of the date of 1457 and insert it at a later date as an earldom of imaginary creation by Queen Mary; but for what reason that is to be done, except it is that they have got into a mess with their Orders" (*i.e.* the second and third Order of the 26th February 1875), "I do not know. The Committee for Privileges made an unfortunate report; they came to what I consider a most erroneous conclusion, supported by no facts whatever. I have no doubt the noble Lords who came to that conclusion took great pains with the case. They must have taken immense pains, because to give a judgment when all the facts are against you must be a difficult thing to do."

Lord Mansfield then called attention to a most pertinent consideration:—"It seems to me very curious that the Committee did not consult their legal advisers upon the law of Scotland. If they had done so, although they might perhaps have come to their decision, they would certainly never have said that one thing which proved it to be right was, that, although

Queen Mary's charter was dated the 23d of June 1565, it was not until the 1st of August in that year that Lord Mar took his seat, and therefore he could not have sat under it." I note Lord Mansfield's observations here, because this was a second of three points of evidence which Lord Redesdale says the Committee for Privileges had before them in 1875, which the Commissioners of Ranking had not before them in 1606, and which would have induced a ranking merely from 1565. "Now, my Lords," said Lord Mansfield, "this was a territorial title, and everybody in Scotland knows that it requires a month or more to make up your titles and get infestment. These proceedings are not known to English peers, but they are known to all of us, because we succeed to our property in that way. The process is very much more rapid at the present time, but that was the case when I succeeded to my property, and this being a territorial peerage, that accounts for the delay which took place between the 23d June and the 1st August. The fact that Lord Mar did not sit in the meantime as Earl of Mar is no difficulty at all in the case." I am glad to be able to cite this living testimony of a peer holding by feudal tenure in Scotland to what I have proved in an earlier page by law and practice as current in the sixteenth century.

Lord Mansfield ended by expressing his conviction, as Lord Huntly had done, to the assembled Peers, that "you would be proceeding *ultra vires* in ordering the ancient earldom of Mar to be struck out. My Lords, up to the present time the House of Lords has always considered the Union Roll as part and parcel of the Act of Union, and has attached to it the importance and authority which attach to the Act itself. The question has been asked; What can be done? The only thing which could have been done would have been to have referred the matter to the great tribunals in Scotland, not to any tribunal in this country. Whether or not it might have been considered by your Lordships that this was a case within the jurisdiction of the Court of Session I know not; but I have carefully gone through the whole of this question, and there is one thing which presses very much upon my mind, and that is, that the opinions of the Attorney-General, Sir Richard Baggallay, and of the Solicitor-General for Scotland, Mr. Millar, now Lord Craighill, were adverse to the conclusion at which

the Committee arrived; but in defiance of that advice the Committee for Privileges came to the conclusion they did. Therefore there were lawyers on the one side, and there were lawyers on the other side: and I suppose that no one will dispute that Sir Richard Baggallay and Mr. Millar were very well qualified to form and to give an opinion upon the question. I trust," concluded Lord Mansfield, "your Lordships will not pass the Resolution which has been moved by the noble Duke."

The lay Lords having thus spoken, including the noble Chairman of Committees, it was evident that what the House in general was entitled to expect would be the deliberate opinions of the Lord Chancellor, and any other law Lords who might address it upon the questions of principle, and the application of principle affecting the merits of the Duke of Buccleuch's Resolution,—those questions arising substantially out of the petition of Lord Kellie, together with the appeal of Lord Redesdale to the House in vindication of the supreme jurisdiction of the House in Scottish Peerages, which I had ventured to question in my recent memorandum, and in the Protest on which that memorandum was founded. Answers to these questions of principle were accordingly supplied by Lord Selborne, who spoke immediately after Lord Mansfield, and by Lord Chancellor Cairns, in words admirably precise and clear, although, as it appears to me, they rather felt their way towards the conclusions they arrived at from the basis of preconception than from that of fundamental assurance. Their views, however, checked by the Report of the Select Committee, appointed, as we shall see, on the suggestion of the Lord Chancellor, must now be considered as those of the House for all practical purposes,—the question, nevertheless, whether those views are in every point justified by law, practice, and precedent, remaining untouched in the background, and liable necessarily to correction by the courts of law in the future. I say "checked" by the Report of the Select Committee, inasmuch as it will be found that one important point laid down or taken for granted by Lord Selborne was departed from under the collective and overruling sanction of the Report, as adopted by the House.

I shall endeavour to present the speeches of the noble and

learned Lords in the most succinct form, with such comments as may appear necessary, but referring the reader to the Appendix for the entire text, as taken down *verbatim* by the official short-hand writers of the House of Lords.

Both speeches were in strong deprecation of the Duke of Buccleuch's Resolution, but not altogether on the same grounds. The main point on which the noble and learned Lords agreed was that the adoption of the Resolution would commit the House to the assumption of a legislative power which it did not possess. On the other hand, Lord Selborne was opposed to the *salvo* appended to the Resolution, as weakening the effect of the Resolution of the 25-6th February 1875 in favour of Lord Kellie, and tending to a reopening of the question as to the right of the heir-general; whereas the Lord Chancellor considered that it was that very *salvo* which rendered the Duke's Resolution less objectionable than it was when originally placed upon the notice-book, that is to say, without the *salvo*. But the points of agreement and diversity will become more apparent as I analyse the successive arguments. Lord Selborne's deprecation of any reconsideration of Lord Mar's right, coupled with the fact that he had been (as Sir Roundell Palmer) Lord Mar's leading counsel up to the moment of his promotion to the woolsack in 1872, cannot be imputed to any change of view with respect to that right, but simply to what appeared to him the overruling necessity to support the credit of the judgment of the Committee for Privileges, as adopted by the House in 1875, to the uttermost.

Both Lord Selborne and the Lord Chancellor laid it down as the indispensable basis of discussion that the decision of 1875 must be considered as final, right or wrong, and not to be questioned. Lord Selborne began his speech by declining to follow Lord Mansfield into the grounds of the decision of 1875. "We are all very well aware," he observed, "that both before that decision and afterwards there had been various persons who have entertained a different opinion upon the merits of the question; but your Lordships will, I think, hold that, it having been decided in one particular way by a Resolution of your Lordships' House, that is a determination which, so far as it goes, is binding upon your Lordships, and that this discussion must proceed upon that assumption." Lord Selborne accord-

ingly declined "going at all into the question whether the decision of 1875 was right or wrong." This, I may observe, was practically indorsing Lord Redesdale's appeal on the question of jurisdiction, and echoing his words,—“I do not enter into the question whether that decision was right or wrong; it was the decision of the House.” Lord Chancellor Cairns similarly stated, after noticing the decision of 1875, “My Lords, that conclusion having been arrived at by the Committee for Privileges, and confirmed by your Lordships’ House”—the Queen’s approval being thus taken for granted as a matter of course, however technically requisite—“I apprehend is conclusive for all practical purposes in this House;” and he proceeded to express his surprise that Lord Mansfield had “set at absolute defiance the conclusion at which the Committee had arrived, the conclusion which had been confirmed by the House,”—still in oversight of the fact that the “confirmation by the House was merely the adoption of the Resolution of the Committee as the expression of their own opinion and advice to be sent up for the consideration, approval, or disapproval of the Sovereign. “My Lords,” continued Lord Cairns, “it is not the custom of your Lordships to admit argument which would be in direct opposition to a decision which the House has already come to.” I do not say that the Lord Chancellor and Lord Selborne were not justified in declining to rediscuss the decision; but the true reason, I submit, why such rediscussion was to be avoided by them in their responsible position was, that in every such case the House, after reporting its advice by way of Resolution to the Sovereign, becomes *functus officio*, cannot review its Resolution, and the ultimate adjudication rests with the Sovereign, judging according to law. But the authority and intervention of the Sovereign was completely overlooked by the two noble and learned Lords, as well as by Lord Redesdale, and by every one who took part in the debate except Lord Mansfield, who, like Lord Marchmont in the Cassillis claim in 1762, stood boldly forward as the Abdiel, “alone found faithful” to loyalty and law, at that moment.

Lord Selborne founded his opposition to the Duke of Buccleuch’s Resolution on two grounds:—The first ground was, that it was “not really consistent with what was resolved by

the House in 1875; while, if it were carried, it would, instead of supporting and fortifying the authority of what was then done, tend as much as anything could do to destroy and to throw discredit upon it." The second ground was, that acceptance of the Resolution would commit the House to an assumption of jurisdiction and power with regard to Scottish Peerages and the Union Roll which the House had never hitherto exercised. The Lord Chancellor went fully with Lord Selborne on the second of these two grounds, but their views were very divergent upon the former.

In support of the first point in Lord Selborne's first ground of opposition, viz., "that the Duke of Buccleuch's Resolution was inconsistent with the Resolution"—the noble and learned Lord ought strictly to have said, the Order of the House—"in 1875," he observed,—“The noble Duke, in the first place, affirms”—in terms, I may interpose, of Lord Kellie's petition and of Lord Redesdale's speech—"that the Resolution and judgment of the House on the 26th February 1875 has declared the dignity of Mar to be entitled to a particular precedence according to the date of creation of that Earldom, which the Resolution of the House says was in 1565. My Lords," observed Lord Selborne, "I do not so read the Resolution which the House arrived at on the 26th of February 1875. That Resolution, after affirming that the petitioner, Lord Kellie, had made out his claim to the dignity of Earl of Mar created in 1565, and ordering that Resolution and Judgment to be transmitted to Scotland, proceeded to direct this,"—what follows being, as I have remarked, not a Resolution but an Order of the House,—“that at the future meetings of the Peers of Scotland, ‘for the election of a peer or peers,’ ‘the Lord Clerk Register do call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland, called at such election.’ That was a very different thing indeed from saying, as this Resolution does, that it shall be called according to the date of the creation of the earldom. And, my Lords, I not only say that the natural meaning of those words is that it should be called according to the actual place which it had upon the Roll; but I may appeal to what has just now been said by the noble Earl, the Chairman of Committees, who has virtually admitted the same thing, because he says it was a pity that

what is now proposed was not done at that time. (Hear, hear.) Of course, if the words which I have read meant the same thing with what is stated to be their meaning in the noble Duke's Resolution, it was done at that time. But, my Lords, the words mean quite a different thing. They mean the place which that earldom had and was entitled to upon the existing Roll of Peers." Nothing, I may observe, can be more just than the distinction thus drawn. The Duke of Buccleuch's Resolution, like Lord Kellie's petition, was framed for the purpose of escaping from the embarrassment in which Lord Kellie, and other Peers likewise, had been placed by the operation of the Order of the 26th February 1875.

On the second point of Lord Selborne's first ground of opposition he was, I think, less happy than in the rest of his speech. At all events, he did not carry with him the assent of Lord Cairns, nor that of the Select Committee afterwards. In his anxiety to support and fortify the Resolution recognising the dignity of Earl of Mar created in 1565 as in Lord Kellie, he endeavoured to import the reasons alleged in the speeches in Committee for Privileges into the Resolution, so as to give it the broadest possible construction against the heir-general. "And now, my Lords," he said, "I will give a reason for what I have said, that the authority of your Lordships' decision, instead of being supported, would be really impeached and impugned if this Resolution were to be adopted. Although, no doubt, the decision of the House of Lords does not in that respect embody the grounds of the judgment delivered in the Committee for Privileges,"—Lord Selborne proceeding, like Lord Cairns, on the assumption that the House of Lords is a court of law, and delivers final judgment in peerage claims irrespectively of the Sovereign or of any appeal on the part of a claimant or party interested :—" Yet, as a matter of fact, we all know, and we have been told so this evening, that the real ground upon which the Committee for Privileges proceeded was that in 1565 there was no Earl of Mar existing of earlier date than that period, and that the ancient earldom had not been restored by the means which, down to the date of that decision, had always been supposed to have had the effect of restoring it. Therefore, the decision asserted virtually, though not in form, that there was only one Earl of Mar, and that

there had been only one Earl of Mar since 1565, and that was the holder of the earldom created in that year. But upon the Union Roll and the Roll of the Peers of Scotland there always had been an Earl of Mar standing, and therefore the place of the Earldom of Mar (if there was only one) upon the Roll of Peers was its existing place upon the Roll, and not any new or different place." Lord Selborne proceeded to observe that "the number of precedents which the noble Duke mentioned in cases where new rights of peerage had been established, or where peerages had been restored after attainder, which were not on the Roll before, and were then ordered to be put upon the Roll, are no precedents whatever for taking away from an existing peerage, which the principle of the decision determined to be the only existing peerage at that time, its actual place and precedence, whatever that might be, upon the Roll. The Resolution" (*i.e.* Order) "of 1875 merely said that that place was to continue the place, and the present Resolution would not affect that. My Lords, as I understand this Resolution, and as it has just been explained to your Lordships, it does not direct a change in the Roll, it does not direct the erasure of the existing title of Mar from its existing place upon the Roll, and the introduction of that same title in another place; but it proposes that the Lord Clerk Register should be directed to call the title of Mar in the place and precedence to which it would be entitled according to the date of the creation of that earldom, that is 1565. The more ancient peerage would rank in the earlier place upon the Roll, which this Resolution does not alter, and the effect, therefore, of the Resolution would really be to introduce a second Earl of Mar into the Roll, leaving the original earldom in its old place, and in that way to encourage instead of repelling the idea that there were two Earls of Mar. Anything really more destructive of the authority of the decision of 1875 I for my own part cannot conceive." It was not, I must interpose, suggested by any one that an actual erasure was contemplated by the Duke's resolution, but a virtual striking of the ancient earldom off the Roll; and Lord Selborne in the passage just cited entirely overlooks the correlative words in the Resolution, importing that the title shall be called "in no other place" than under the year assumed to be assigned by the decision, *viz.* 1565. It is of more importance

to remark that Lord Selborne's attempt to import the opinions pronounced in Committees for Privileges into the Resolutions was at variance with ancient principle; while his anxiety to support the finality of the decision in favour of Lord Kellie to the exclusion of any reopening of that decision through recognition of the possibility that there might be a still existing Earldom of Mar of the original creation, led him very nearly to the adoption of that doctrine of expediency as an element of weight in peerage matters, which was inculcated upon the House of Lords by Lord Hardwicke and Lord Mansfield in 1762 and 1771. I may even suggest that, seeing that the noble and learned Lord admitted that there were varying opinions as to the justice of the decision of 1875, or at least on the merits of the case then before the Committee, the maxim "*In dubiis benigniora semper sequenda sunt*" might have been expected to rule the interpretation of the decision in the favour of the man who was supposed to be injuriously affected by it. It is obvious that this portion of Lord Selborne's argument was directed against the more favourable view, in recognition of the possibility that the heir-general might have at least an independent right to the original Earldom of Mar, which had been adopted by Lord Kellie and Lord Redesdale, and was embodied in the *salvo* subsequently added to the Duke of Buccleuch's Resolution. The Report of the Select Committee drawn up by Lord Cairns adopts the most favourable view, at the risk of impugning the force of the decision of 1875, so strongly deprecated by Lord Selborne; and in the same breath it repudiates Lord Selborne's doctrine that the speeches in Committee for Privileges may be imported into a resolution so as to give it an interpretation and influence beyond its simple terminology, as he attempts in the passage just quoted to do in the case of the Resolution of 1875 in favour of Lord Kellie. I have elsewhere shown that those speeches in Committee are in no sense "judgments," as they have been represented of late years.

Lord Selborne supported his second and final proposition, viz. that acceptance of the Duke of Buccleuch's Resolution would commit the House to an assumption of jurisdiction and power with regard to Scottish peerages and the Union Roll which it had never hitherto exercised, with very cogent reason-

ing, both from principle and example. "It appears to me," he said, "to be a question of very grave and serious importance whether your Lordships have any such right to interfere with the existing precedence upon the existing Roll of Scottish Peers, Mar or any other, as this Resolution claims. . . . No precedent has been referred to for changing by a Resolution of this House the precedence upon the Rolls of any existing peerage which stands there." I "entertain a most serious doubt whether it would not be against the spirit of Acts of Parliament upon the subject for your Lordships to assume any such jurisdiction."

Lord Selborne proceeded to vindicate the character and the authority of the Decree of Ranking in 1606, and of the Union Roll of 1707. He remarked that in the Decree of Ranking the power of appeal for higher place was not reserved to the "House of Lords of Scotland"—the mistake that Lord St. Leonards fell into—"but to the Court of Session in Scotland,"—pointing the contrast as showing that the final jurisdiction rested there, and not with the supposed "House of Lords of Scotland;" remarking that "if there had been such a power" reserved to the House of Lords, "it might perhaps have descended to the House after the Union," but that it had not done so—thus repudiating a fundamental point upon which Lord St. Leonards ruled against the Montrose claim in 1853. Lord Selborne proceeded to cite the confirmation by Act of Parliament in 1633 of the Decree of Reduction and declaration of precedence obtained by the Countess of Buchan before the Court of Session under the reservation in the Decree of Ranking in 1628, as "showing how high a respect the Parliament of Scotland paid to the Roll of precedence as it was settled by the Commissioners of James I.," *i.e.* by the Commissioners of Ranking in 1606. "Nothing would, in my judgment," he proceeded, "be more unsafe for your Lordships than to take upon yourselves the office of rectifying any errors, if errors there be, in the actual ranking of those peers,"—and he proceeded to cite the question of precedency between Crawford and Sutherland, standing as it does on precisely the same footing as the precedency of Mar as sought to be corrected by the Duke of Buccleuch's Resolution:—"The Duke of Sutherland is also Earl of Sutherland; and if the old title of Mar is

out of the question, I believe I am not wrong in saying that that is generally understood to be the most ancient earldom in Scotland, and it was established in the person of the Countess of Sutherland, the great-grandmother of the present Duke, by this House, upon the footing of that being so. My Lords, the Earldom of Sutherland is not in its proper place according to that decision upon the Roll of the Earls of Scotland. It stands below, I think, at present two, and formerly more than two, other Earls of more recent creation. Why that is, whether it is as the noble Earl who spoke last has suggested, because the evidence brought before the Commissioners who inquired into the Ranking was imperfect, or for what other reason, I cannot tell; but it would be a very dangerous thing if your Lordships were to take upon yourselves by a vote of this House to rectify the precedence of the Earl of Sutherland and, upon the petition of the noble Duke who bears that title, to order that that Earldom should be called before the Earldom of Crawford which precedes it. But your Lordships might just as well do that as do what you are asked to do now, because the result of the exercise of your judgment in the matter is that it may be that the Earldom of Mar has been put in too high a place upon the Roll. If so, so has the Earldom of Erroll and the Earldom of Crawford—and I do not know why your Lordships are to rectify that error, if error it be, in the case of the peerage of Mar more than in the case of the peerages of Erroll and Crawford.” Besides, Lord Selborne added, “further than that, if we are to go into the regions of conjecture, I do not know that it is an impossible thing, even upon the assumption which I am bound to make, that Queen Mary did create a new Earl of Mar in 1565—I say that I do not know that it is an impossible thing that Queen Mary might have given to the Earl then created a higher precedence than that which he would have had according to the date of his creation:”—very plausible, I would observe; but a beating of the air in the view of those who look on the matter with the eyes of Lord Hailes and of the feudal and peerage law of Scotland. It stands to reason that if there had been such a grant of special precedency only forty-one years before 1606, it would have been on record, and produced in evidence before the Commissioners, which we know by the “*De Jure Prælationis*,”

was not the case. I might suggest that the same theoretic conjecture would equally account for the precedence of Crawford over Sutherland. But, in Lord Selborne's words:—"The truth is, that your Lordships are invited to enter upon a field which does not belong to your jurisdiction at all, and to take a step which, so far as I can see, is in no way whatever involved in or justified by the Resolution passed in February 1875."

Lord Selborne then vindicated the authority of the Union Roll—"which you are asked," he observed, "without any precedent as far as I know, to alter." He vindicated it as having "a very high authority indeed, inasmuch as it is styled in an Act of Parliament passed in 1847" (of which I shall have much to say hereafter), "an authentic list of the peerage of the northern part of Great Britain, called Scotland, as it stood on the first day of May 1707," etc., etc.—a proximate testimony to its importance sufficient perhaps for Lord Selborne's argument. "Now, my Lords," he proceeded, "this title of Mar is one which has been enrolled and registered by the House ever since the Act of Union. It is one which stood on the Roll at that time, as it stands now, in the precedence given to it by the Decreet of Ranking, in which precedence the Earl of Mar sat in the last Parliament of Scotland, and indeed always sat from 1606 in every Parliament in Scotland; and your Lordships, having determined that that earldom was merely created in 1565, are surely not now going to take away the precedence which for more than two centuries the Earls of Mar enjoyed?" I cannot but interpose the observation here, that nothing but such a conjecture as that the noble and learned Lord indulged in, viz. of a special grant of precedence by Queen Mary in 1565, could possibly meet the difficulty that the re-creation alleged in 1565 had only taken place forty-one years previously to the promulgation of the Decreet of Ranking in 1606; and the circumstances being within the memory of living persons, the Commissioners could not have given a precedence of more than a hundred years without adequate cause. On the other hand, if such special grant had been passed, it would have been produced in 1606 along with the other writs specified in the contemporary minute of the productions upon which the Commissioners went; but no such grant is there specified.

Lord Selborne then proceeded to inquire in what manner

the House of Lords had acted on former occasions in similar matters—whether according to a fixed rule, or in “the exercise of this sort of summary way of authority, with regard to the Scottish Peerage and its elections?” He found, he said, that the House had acted on several occasions in a “manner very instructive.” The first instance he alleged was when “in the last century it desired to have a revised Roll of the Peers of Scotland, with the omission of attainted peerages and the addition of any which had been inserted since the Union—I mean claims to which had been established. What course did it take? It sent to the Court of Session in Scotland to return a revised Roll, which the Court of Session accordingly did.” This took place in 1739, and the illustration was pertinent to Lord Selborne’s argument. Lord Selborne then cited Lord Rosebery’s Resolution of 1822. “Some inconvenience had been found to arise from persons tendering their votes at the election of Scotch Peers whose right to vote was very doubtful and controverted; and this House passed a Resolution which a good many years afterwards” (in 1862) “was rescinded *sub silentio* upon the motion of the noble Duke opposite” (the Duke of Buccleuch). “That Resolution was to the effect, not that the existing Roll was to be in any way interfered with, but that upon the descent of a peerage, if it was claimed by any collateral more remote than a brother, that claim was not to be admitted at the elections until it had been established and approved by this House. That Resolution was undoubtedly adopted; but it has been rescinded at the motion of the noble Duke, I suppose because there was a fear that it would interfere unduly with the privileges of Scotch Peers.” I have already spoken sufficiently of this Resolution of 1822. Again, “in 1832, a Select Committee of the House was appointed to inquire into the subject, and that Select Committee recommended that the House should assume a considerable authority; that it should direct the Lord Clerk Register to make out a new Roll, omitting those peerages which had not been called for a certain time, or which, if called, had been objected to, and to do certain things, into the details of which I need not enter.” The Report of the Select Committee is printed, I may interpose, in the Appendix to the Report of the Select Committee on the Mar Earldom, presently to be dealt with. “But the House,” observed Lord Sel-

borne, "did not think it right to assume that power,"—I should rather say, felt that they had no power to assume it; "and what the House did was to let the matter sleep for some years; and then, in the year 1847, an Act of Parliament was passed" upon which and its enactments Lord Selborne fixes, as showing that when it has been thought necessary to interfere with the manner of calling peers as prescribed by the Act of Union, it has been thought proper to give that power by Act of Parliament. The Act of 1847 may be, as I shall show, a very unfortunate act of legislation; but Lord Selborne was quite right in principle in attaching the weight to it that he did—not, I must protest, on its own merits or legality, but as showing the limitation of the action of the House by Parliamentary authority, and as vindicating his position that the adoption of the Duke of Buccleuch's Resolution would be (as I ventured to submit in the paper criticised by Lord Redesdale) *ultra vires* of the House of Lords. And this position, which cannot be shaken, extends in its influence far beyond the special point to which Lord Selborne directed it.

Lord Selborne proceeded to recite the provisions of the Act of 1847, and of a subsequent Act of 1851, for the purpose of showing that the House "would be going very clearly against the mind of Parliament which passed these enactments, if without reference to precedent to justify it (and if there are such precedents, it would be desirable to see them), you assume the power which the noble Duke now asks you to assume. That Act of Parliament, after reciting what I have read concerning the Union Roll called at elections, went on to enact, first, that no peerage should be called in right of which no vote had been received since the beginning of the century; and, secondly, 'that if any vote or claim to vote in respect of any title of peerage on the Roll called over at any such meeting shall be disallowed by' this 'House, upon any proceeding had in trial of any contested election, the House of Lords may, if they shall think fit, order that such title of peerage shall not be called until some right to it shall have been established. But here," observed Lord Selborne, "without anything in the Act of Parliament to warrant it, we are asked to order that the title of Mar now standing in the Roll shall no longer be called as it stands there. The third enactment was that all pro-

tests made at such elections should be transmitted to this House, who might, if they thought fit, inquire into the questions raised by such protest, 'and if they should see cause, order the person whose vote or claim has been so protested against to establish the same,' under the same rules as apply to the case of ordinary claims." A comment made for the sake of brevity, which I must supplement by remarking that, whereas "ordinary claims" must by English law be preferred to the Sovereign first, who may refer them to the House of Lords, or any other tribunal, for advice as to their merits, the provision of the Act is that the claims protested against—and I shall have occasion presently to point out the unprecedented and illegal nature of the procedure there contemplated—shall be investigated and determined upon by the House of Lords without reference from the Sovereign, under the theory of the absolute jurisdiction of the House in dignities, which was as much in favour in 1847 as it has been in 1876, and with as little foundation in law at the one period as the other. "A protest," said Lord Selborne, "has been made in this case"—of Mar; but he did not point the object of the observation; and I do not understand it. "Then, my Lords," he proceeded, "there is this power given by the Act of Parliament,—'That whenever any peer shall have established his right to any peerage, or his right to vote in respect of any peerage, and the same shall have been notified to the Lord Clerk Register, by order of the House of Lords, the said Lord Clerk Register, or Clerks of Session, shall not, during the life of such peer, allow any other person claiming to be entitled to the same peerage to take part in any such election, nor shall it be lawful for the said Lord Clerk Register or Clerks of Session to receive and count the vote of any such other person, till otherwise directed by the House of Lords.' My Lords, that certainly seems very carefully to guard the rights of persons who, even after a claim has been allowed, and even during the lifetime of a person whose claim has been allowed, make any persistent claim to the same peerage; they may not take part in the election until it is otherwise ordered by the House of Lords." These observations, I should observe, cannot apply to Lord Mar, the heir-general, whose right is absolutely negatived, according to Lord Selborne, by the decision of 1875. Nor do I see how, after a claim has been legally—

legally, I say, and formally—determined in favour of the claimant to a dignity, it can be in the power of the House of Lords to permit a counter-claimant of that identical peerage to interfere in elections. The only remedy in such a case would be by action of reduction in the Court of Session, on a principle and usage of Scottish law into which I need not here enter.

Lord Selborne concluded by citing a further enactment in 1851, “which says that the Lord Clerk Register shall transmit to the Clerk of the Parliaments the titles of any peerages called at such meeting in right of which no vote shall have been received and counted for fifty years last passed, or for any longer period, and on receiving an order from the House of Lords to abstain from calling such title at future meetings for such elections, it shall not be lawful for the said Lord Clerk Register or Clerks of Session to call such title at any subsequent meeting, or to administer the oaths to any person claiming to vote in right of such peerage, or to receive and count the vote of any such person, or to permit any such person to take part in the proceedings of any such election, until otherwise directed by order of the House of Lords. There again,” observed Lord Selborne, “the power is carefully guarded.” I may observe that under this Act it is in the power of the House of Lords to order that the name of the Prince of Wales, as Duke of Rothesay, the premier Peer of Scotland, shall not be called henceforward at the elections at Holyrood, no Duke of Rothesay having voted since 1788 ; while, after such Order has been issued, the right of His Royal Highness to honour any peer or peers by his support would be disallowed till the Lord Clerk Register was “otherwise directed by Order of the House of Lords.” It is to be presumed that no distinction will be made at any time by the House of Lords between the Duke of Rothesay and any other peer similarly situated.

Nothing can be more admirably set forth than this induction by Lord Selborne as to the limits of legality and illegality—of *intra vires* and *extra vires*, as attaching to the Resolutions and action of the House of Lords in regard to Scottish dignities—the respect or disrespect due to the Act of 1847 having nothing to do with the argument founded upon it.

Lord Selborne’s closing words were:—“My Lords, the most careful and anxious way in which these provisions have

been made by Parliament, giving the House particular powers with regard to calling titles upon the roll at the elections of Scotch Peers, and, as far as I can see, not giving any such power as the noble Duke now proposes, leads me to the conclusion that it is at least exceedingly doubtful whether what the noble Duke asks your Lordships to do is within your legitimate powers, and I put it to you whether anything could more tend to discredit the decision which was come to two years ago [*i.e.* the Resolution of the 25th February 1875, from first to last the subject of the noble Lord's solicitude] than that your Lordships should take a course not clearly justified by precedent, and not clearly within your constitutional powers."

Lord Chancellor Cairns's speech was much shorter than Lord Selborne's, but equally to the purpose, standing, as I have already shown, on a common footing with Lord Selborne in the position that the decision, or Resolution, of the 25th February 1875 must be supported as beyond question, but declining to import into that Resolution, as Lord Selborne had done, a declaration inimical to the heir-general as affirming the original earldom to be extinct, when the Resolution itself, apart from such importation from the speeches in Committee, simply affirmed the right of Lord Kellie as heir-male to the earldom of 1565. I think Lord Cairns was right in this dissent. It matters nothing that the Resolution was arrived at on the basis of the opinions expressed in the speeches, *viz.*, that the original earldom was extinct. There was no petition from any one claiming the original earldom—Lord Mar, in possession of the original earldom by the law of Scotland, made no claim to the second or modern dignity—the House had not been empowered by the Sovereign to express any opinion upon a right to the original earldom; and, apart from all questions lying more remotely in the background, the opinion tendered to the Sovereign in the Resolution fell to be construed with the most rigid severity in the interest of any one who could be directly or indirectly affected by it injuriously.

It would have been impossible for any one to have spoken more feelingly than Lord Cairns did at the commencement of his speech in reference to the heir-general:—"I do not remember," he said, "any case which ever occasioned me more

anxiety, or in which one's sympathy was more enlisted on behalf of the *claimant*" (alas! alas! for this unlucky and misleading word) "who did not succeed before your Lordships' Committee. That gentleman had been supposed to be the person entitled to the Peerage of Mar. He had been accepted as such, I believe, by all who were related to the family, and, among the rest, by that particular family who afterwards became his antagonists for the title. They had received him as the proper heir to the older title, and it was in that position that, after holding it for some years, he found himself opposed by those who had in the first instance admitted his claim;" observations which, however just as a ground of sympathy for the heir-general, must not be unduly construed (as Lord Cairns most certainly never intended them) so as to create prejudice against the late Earl of Kellie or his son, who, on the assumption that their claims were well-founded, cannot be blamed for asserting them. "My Lords," continued Lord Cairns, "notwithstanding that, after the most careful and patient investigation, your Lordships' Committee for Privileges were of opinion that Mr. Goodeve Erskine had not substantiated his claim to the Earldom of Mar; and, on the other hand, that Lord Kellie had made out his claim to an Earldom of Mar, which, according to the judgment of the Committee, had its origin in the year 1565." How, I must again and again ask—for the error seems to be inveterate—how can a man be qualified as a "claimant" who claims nothing, who merely opposes the claim of another, and whose "claim" to be brought before the House of Lords in such a manner as to enable the House to pronounce an opinion upon it in a report to the Sovereign, must come before them by reference from the Sovereign, the Sovereign himself being solely entitled to interfere by a petition from the claimant? The fundamental maxim that no dignity can be destroyed or set aside indirectly by a side wind, or without express specification of the dignity and its tenant by a tribunal legally competent to do so, seems to have been entirely lost sight of throughout the Mar discussion. If the position of "Mr. Goodeve Erskine" had been as Lord Cairns puts it, there would have been some ground for Lord Selborne's importation of the speeches of the noble and learned Lords in Committee into the Resolution. But under that alternative,

the *salvo* of the Duke of Buccleuch's Resolution, which Lord Cairns considers rendered the Resolution less objectionable—I will quote the words immediately—ought to have rendered it more so, as opening the way to the recognition of two Earls of Mar, and thus to the *disprezzo* of the decision, as maintained by Lord Selborne. But to pass from this:—

Lord Cairns commenced his address thus:—"My Lords, I cannot avoid thinking that the Resolution which the noble Duke has placed upon the paper brings your Lordships into a position of considerable embarrassment. My Lords, the particular form of the Resolution has been somewhat altered, since, in the first instance, notice was given of it; and whereas, as it stood originally, it appeared to be a Resolution directing the Lord Clerk Register to call the Earldom of Mar at a particular place in the list, and at no other place, the Resolution, as it now stands, adds to that order a saving of the rights of all the Peers of Scotland, to whatever may be their proper places, 'upon further and better authority showed for the same.' I own that the qualification introduced by this saving appears to me to make the Resolution less objectionable than it was in its original form; but, at the same time, I cannot but think that, even in its altered and ameliorated form, your Lordships, by assenting to it, would run the risk of doing what I feel certain your Lordships would only do by inadvertence, namely, under the guise of passing a Resolution, really make that which would be a judicial, or, if not a judicial, a legislative declaration."

After the kindly reference to the heir-general, just cited—an affirmation that the "conclusion arrived at by the Committee for Privileges, and confirmed by your Lordships' House, I apprehend, is conclusive for all purposes in this House" (all reference to the authority of the Queen being set aside), and a censure upon Lord Mansfield for having set that conclusion "at absolute defiance," in disregard of the "custom" of the House to disallow "arguments which would be in direct opposition to a decision which the House has already come to"—all which I have already cited and touched upon—Lord Cairns declined "to follow in any way the views which the noble Earl takes upon the subject of this decision. But what I do submit," he said, "to your Lordships with some confidence is, that

we ought to be very careful not to go beyond what the decision actually was."

"What the decision," he proceeded, "actually was, of course appears upon the record of your Lordships' House, and upon the Order which was made by your Lordships' House upon the report of the Committee. This is the Order which was made by your Lordships:—'That at the future meetings of the Peers of Scotland, assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland called at such elections, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said earldom, and do permit him to take part in the proceedings in such elections.'"

It appears to me that there is some confusion here between the decision of the Committee of Privileges confirmed by the House, and the subsequent Order, but this does not affect the argument.

The Lord Chancellor proceeded to develop his opposition to the Duke of Buccleuch's Resolution on two grounds, tending to the same conclusion as that arrived at by Lord Selborne, viz., that the acceptance of the Resolution would be to assume an authority *ultra vires* of the House of Lords.

On the first of these two points he spoke as follows:—"Your Lordships will observe that this Order"—that of the 26th February 1875, which he had just read, "is entirely affirmative. There is nothing whatever in it which is negative; and the affirmative Order of the House is that the Lord Clerk Register call the title of the Earl of Mar according to its place in the Roll of the Peers of Scotland. My Lords, whether that means according to the place of a peerage created in 1565, or whether it means to leave the Lord Clerk Register at liberty to judge for himself what the precedence of the earldom may be, I do not stop now to inquire. That is a matter which must be considered in some other form, and cannot be decided upon a Resolution now passed by your Lordships' House,"—a suggestion upon which I may remark that I do not see how the right of the Earldom of Mar, standing on the Roll, to the precedence assigned by the Decreet of Ranking, can be controverted except

in the course of law provided by the Decreet; and that Lord Selborne's remarks in vindication of that right, on the assumption that the Earldom on the Roll is the Earldom of 1565, are fully warranted. "But what I do submit to your Lordships," Lord Cairns continued, "is, that this having been the Order of the House, the Order of the House having been in its form merely affirmative, and having no negative words in it, it would be entirely reopening the decision which was arrived at if you were to pass this Resolution—it would be supplementing it with that which is not the natural corollary of that which has been ordered by the House, but is something entirely different, something very much further, and very much higher in its operation, and therefore it would be doing what I took the liberty of saying at the outset your Lordships in this view of the case were asked to do, viz., under the shape of a Resolution of the House to pronounce a judicial decision affecting rights of peerage. That," said the Lord Chancellor, "is my first reason against accepting this Resolution."

Lord Cairns's second reason was that previously urged by Lord Selborne, viz., that it would be a meddling with the Union Roll, which could not be done without legislative authority *ab externo*, i.e. from Parliament—the House having no such legislative power constitutionally as inherent in itself,—in short, to act as suggested by the Duke's Resolution would be *extra vires* of the House. "My Lords," proceeded Lord Cairns, "my second reason is one which has been adverted to by my noble and learned friend (Lord Selborne). It is quite clear that if your Lordships not being now satisfied with the affirmative Order, which was an Order passed as such Orders are passed, as a matter of course, upon every Report of the Committee for Privileges, should pass a negative Order, that is to say, an Order directing the Lord Clerk Register to call the Earldom of Mar in another place, the effect of that undoubtedly will be that you will be doing what, so far as I know, has never, with one exception, which I will explain, been done before—you will be affecting the Union Roll of Scottish Peers.

"Now the Union Roll of Scottish Peers is a document which has a certain authority. I do not mean to say that it is an infallible document, or one which can in no way be altered by authority," provided, it must be interposed, it be by

due authority—"but it is a document which, as my noble and learned friend has correctly said, is declared to be of authority by an Act of the Legislature, the Act of 1847," Lord Cairns, like Lord Selborne, overlooking all the deeper grounds of its authority. "The way in which the authority of the Union Roll is there mentioned is very remarkable. It is called 'an authentic list of the Peerage of the north part of Great Britain, called Scotland, as it stood the 1st day of May 1707, was returned to the House of Lords by the Lord Clerk Register for Scotland, attested by him pursuant to an Order of the House of Lords.' And then we are told by this Act of Parliament, that to that list 'sundry Peerages of Scotland have since been added, by Order of the House of Lords, at different times.' There is nothing mentioned here of subtractions from that list, or of alterations in the precedence given by that list. It stands as an authentic list made in an authentic manner, and returned in an authentic manner to this House; and as far as we know by this Act of 1847, nothing has been done affecting it, excepting in the way of adding from time to time those peerages, rights to which have been determined by this House." All this, I need not say, is excellent so far as it goes; but then the authority of the Union Roll rests, not on its acceptance by the House, not on anything which took place in 1707—the House was the passive instrument of registration in the matter—but upon the Decreet of Ranking of 1606, on the corrections in the precedence effected by the Court of Session from time to time, and on the insertion of newly created peerages on the Rolls of Parliament subsequently to 1606, under the authority of the Lord Lyon King of Arms, the official custodier of the Decreet of Ranking, and of the Roll which that Decreet originally established as the roll of precedence in Parliament.

Lord Cairns proceeded to draw and enforce the same inference from the passing of the Act of 1847 which Lord Selborne had done. I quote the Chancellor's words *in extenso*:—"What," he asks, "did the Act of 1847 do? It seems to me to be a very strong expression of the view of the legislature, that if anything was to be done to that Union Roll, it was to be done by legislative authority, and not merely by a vote of the House, because it gave the House the power (and if the House had the power already, why should that power have been given to

it by Act of Parliament ?) to order a name not to be called upon that Union Roll. It did that in this way. 'If any vote or claim to vote in respect of any title of Peerage on the Roll called over at any such meeting shall be disallowed by' this House, that is to say, disallowed after a certain protest had come up before them, and after the persons who had claimed the right to vote had been called before the House and the cases heard—if, after that was done, any vote or claim to vote shall be disallowed by the House of Lords"—and, I may interpose, there is no security against the Duke of Rothesay himself, the Duke of Hamilton, the Duke of Buccleuch, Lord Huntly, Lord Mansfield, Lord Elphinstone, Lord Saltoun, for not one Scotch Peer is safe, being so dealt with, so far as the terms of the Act go—"the House may if they shall think fit order that such title of Peerage shall not be called over at any future election." If under those circumstances this House comes to a Resolution of that kind, then under the power of this Act of Parliament an order may be transmitted to the Lord Clerk Register that he is not to call the name, and then he is not to call the name.

"Your Lordships," added Lord Cairns, "have acted upon the authority created by this Statute ; for if I remember rightly, although I have not the case here at this moment, a very few years after the Statute was passed, in the case of the title of Colville of Ochiltree, the House acting under the Statute, and having returned to it a protest which had been handed in at a contested election, sat in judgment upon it,"—these words of the Lord Chancellor are by the way remarkable—"called the parties before the House, decided that the claimant who claimed to vote as Lord Colville of Ochiltree had no right, and passed a Resolution that the title of Colville of Ochiltree should never be called again, and ordered the Lord Clerk Register to act accordingly." I should like to know, by way of parenthesis, what would the position of the rightful claimant to such a peerage be, should he appear subsequently to such a Resolution ; and whether the authority for such a summary interposition to his ultimate disadvantage could be justified even by the "omnipotence of Parliament"—no longer entitled to that deification, but the creature of, and controlled by the Treaty of Union.

"Now, my Lords," continued the Lord Chancellor, "if it was

necessary to have an Act of Parliament to order that this should be done, and that it should be done only in those special cases, it seems to me that your Lordships would be in very great danger of assuming a legislative power, if you were to do now by this Resolution of the House what it was supposed in the year 1847 required the authority of an Act of Parliament. (*Hear, hear.*)” I need hardly observe that the principle upon which Lord Cairns’s reasoning and that of Lord Selborne proceeds throughout is, that the House has no legislative authority in peerage matters, and can only act in matters affecting the Union Roll and the rights of the Scottish peers and claimants of Scottish peerages—under special authority conferred upon them by the legislature. This has been the contention of the vindicators of the Scottish law as affecting peerages for generations past; and I shall revert to the point in due time.

Lord Chancellor Cairns concluded his address by suggesting that the Duke of Buccleuch should withdraw his Resolution, and that a Select Committee should be appointed “to consider the matter of the petition of the Earl of Mar and Kellie and the precedents applicable thereto, and to report thereon to the House. It is clearly a subject of such gravity and importance that I think it would be more satisfactorily dealt with by your Lordships after you had the Report of a Select Committee.”

Lord Denman added a few words, expressing his opinion, “that for the House to bind itself to any particular decision by Resolution would be an unfortunate step. I feel perfectly sure,” he added, “that the claimant” (meaning the Earl of Mar, the heir-general) “will have justice done to him; and if ultimately his case should come on appeal”—the word is somewhat difficult to explain—“there are a sufficient number of your Lordships to take an interest in it larger than an ordinary Committee for Privileges, to do justice between the parties,”—Lord Denman thus adding the weight of his authority to the spirit of equity and moderation which suggested the *salvo* in the Duke of Buccleuch’s Resolution, and the admission of Lord Kellie and Lord Redesdale that the “decision” of 1875, “affirmative” for Lord Kellie, was not, I may here say, in application of the Lord Chancellor’s words, “negative” against the heir-general.

The Duke of Buccleuch having assented to the plan proposed, and withdrawn his Resolution, and the Lord Chancellor having moved the appointment of a Select Committee, the question was put, and agreed to : "That a Select Committee be appointed to consider the matter of the Petition of the Earl of Mar and Kellie, presented on the 5th of June 1877, and the precedents applicable thereto, and to report thereon to the House."

I shall conclude this Letter here, and consider the Report of the Select Committee in that which follows; after which I propose to invite the consideration of the reader to the position in which the heir-general of Mar is placed by the Report of the Select Committee as approved by the House. That too will be the fitting place, for as yet it would be premature, to estimate how the questions raised by Lord Kellie's petition and otherwise have been answered by the noble and learned Lords who took part in the debate reported in the present Letter, and by the House which has affirmed and accepted the Report of the Select Committee—the answers to these questions determining the position and attitude henceforward assumed by the House of Lords towards claimants to Scottish peerages (or indeed to claimants of peerages generally), on the one hand, and towards the Sovereign on the other; a position and attitude which can only be appreciated as legal or illegal by the application of the fundamental principles of law which have been established in the earlier pages of these Letters. The question will necessarily follow, What is the remedy in the special case of Lord Mar, and what the security for the rights of the Scottish peers generally as standing on the laws of their country and the protective sanctions of the Treaty of Union? As already stated, some of the positions affirmed by the House are favourable, others unfavourable; some approach to what I have contended for as the truth in these Letters, others unfortunately the reverse of this.

## LETTER XIII.

## SELECT COMMITTEE OF 1877.

OUR attention must now be directed to the Report issued by the Select Committee appointed on the motion of the Lord Chancellor Cairns at the close of the debate of the 9th July 1877. The Select Committee was constituted on the 17th July, and consisted of the following members:—The Lord Chancellor, the Lord President (the Duke of Richmond), the Duke of Somerset, the Earl of Doncaster (the Duke of Buccleuch), the Earl of Mansfield, Earl Granville, the Earl of Redesdale (Chairman of Committees of the House of Lords), Lord Elphinstone, Lord Colville of Culross, Lord Meldrum (the Marquess of Huntly), Lord Rosebery (Earl of Rosebery), Lord Chelmsford (late Chancellor), Lord Penzance, Lord Selborne, Lord Blackburn, Lord Gordon of Drumearn. The Committee met first on the 23d July, when the Lord Chancellor was appointed Chairman, and Lord Kellie's petition, presented to the House on the 5th of June last, having been read, and an order made "after discussion . . . that precedents applicable to the present case be laid before the Committee at its next meeting," the Committee adjourned till Friday the 27th, on which day a draft report, prepared by the Lord Chancellor, was laid before the Committee, considered, and agreed to, with some amendments; and the Chancellor was ordered to make the said Report to the House, which he did; and the Report was ordered to be printed, all on the same day, the 27th July 1877. The importance of this Report as affecting the Earldom of Mar and the Scottish Peerage generally must not be estimated by the rapidity with which it was carried through the Committee. It seems to have been a case of "*Veni, vidi, vici*" on the part of the Lord Chancellor. In fact, it was simply the formal

registration and enforcement by the House of the views and advice expressed by Lord Selborne and Lord Cairns in the debate of the 9th July previously.

The Report is printed under a somewhat misleading title—"Report from the Select Committee of the House of Lords on the Earldom of Mar, together with the Proceedings of the Committee, and an Appendix." The Select Committee was appointed, as appears by the heading of the Report on the succeeding page, "to consider the matter of the Petition of the Earl of Mar and Kellie, presented on the 5th of June 1877, and the precedents applicable thereto, and to report to the House." The impression thus created by the title is that the inquiry had a broader scope, and that the Report entered more than superficially into the subject.

The second article in the Appendix is the "Return of the Long or Great Roll of the Peers of Scotland as it stands of this date, August 1873,"—a Roll described as containing "all the titles of peerage embraced in the Union Roll, No. I., and all the titles of peerage added at various times by authority to the said Roll;" while "it exhibits further the peerages which have been forfeited and those which have been restored, and it distinguishes those titles of peerage which are directed not to be called at the elections of Representative Peers of Scotland, by the provisions of the Statute 10 and 11 Vict. c. 52," *i.e.* 1847,—the provisions in question being given as follows:—"By the first section of the Statute 10 and 11 Vict. cap. 52, it is enacted that at future elections of the Representative Peers of Scotland, 'the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, shall not call the titles of any peerages now standing on the said Roll in right of which no vote shall have been received and counted since the year 1800; nor shall it be lawful for the said Lord Clerk Register or Clerks of Session to administer the oaths to any person claiming to vote in right of any of the before-mentioned peerages, or to receive and count the vote of any such person, or to permit any such person to take any part in the proceedings of any such election until otherwise directed by Order of the House of Lords.'" The Union Roll itself, although referred to as "No. I." in the "Return" just cited, is not given in the Appendix I am now speaking of, nor the Decreet of Ranking of 1606; in short,

the evidence produced upon this point dates from 1873. The third article in the Appendix is a very important one, viz. the Report from the Select Committee of the House of Lords appointed "to take into consideration the existing laws and regulations which relate to the elections of the Representative Peers of Scotland; to consider what steps should be taken to prevent persons from voting at such elections who are not entitled to do so; and to inquire into and report upon the proceedings which took place at the election of Lord Gray, on the 17th day of March last," 1847, "and to report to the House." This was the Report upon which the Statute 10 and 11 Vict. cap. 52, the Act namely of 1847, was framed, submitted to the two Houses of Parliament, and passed.

This Report of 1847 is followed by the Minutes of Evidence received by the Committee. These Minutes record the examination of John Russell, Esq., one of the principal clerks of Session, and of David Robertson, Esq., a Parliamentary agent, who, it appears from the evidence, supplied the Select Committee with the draft of the bill, embodying his views on the subject, which ultimately became the Act of 1847. These Minutes of Evidence of 1847 are followed by an Appendix including various interesting papers, of which I may notice the the following:—1. The "Report from the Select Committee on the Laws relating to the election of the Representative Peers for Scotland, 1832,"—the Report, that is to say, suggesting the series of impracticable recommendations commented upon by the Lord Chancellor in his speech in 1877; and 4. A "Return of all those persons who have voted at any Election of a Representative Peer of Scotland since the year 1800, without protest; also, all those persons who have voted at any Election of a Representative Peer of Scotland since the year 1800, under protest; also, all the Peerages which are at present included in the Long (or Union) Roll; and also, all the Rules or Orders received from time to time by the Lord Clerk Register or his Deputies from the House of Lords, regarding the Election of the Representative Peers of Scotland." This final return is of the meagrest description, omitting many, and entering several twice over, the whole tossed together in marvellous confusion. Lord Rosebery's Resolution of the 13th May 1822 is given; and it might have been expected that the Duke of Buccleuch's

Resolution cancelling it would have been included in the Appendix of 1877; but this has not been done, and to the uninitiated it would appear as if the provisions of 1822 were still in force.

Such are the contents of the document now before us, entitled "Report from the Select Committee of the House of Lords on the Earldom of Mar." I have yet to remark upon one more most important and most unfortunate omission, viz. that of the Statute 10 and 11 Vict. cap. 52, *i.e.* the Act of 1847, upon which the recommendations of the Select Committee proceed. The Report of the Select Committee of 1847 is given, but not the Act itself that proceeded on that Report—the play of Hamlet with the part of Hamlet omitted. I do not know whether it is the usual course to omit such documents, standing as they do on the Statute-book; but if so, the public are sufferers. As the Report stands, there is no means of judging whether its recommendations in regard to the Act 1847 are warranted by the terms of the Act; and it seems doubtful whether the members of the Select Committee themselves had it actually before them. The Act of 1851, also founded upon by the Lord Chancellor in the debate of 9th July, is also omitted; but this is of less consequence.

As the Report of the Select Committee of 1877, so far as it affects the position of Lord Mar, the heir-general, proceeds upon the recitation and application of the Act of 1847, as shadowed forth in Lord Cairns's speech, I propose to insert here the Act in its integrity, and then the Report of the Select Committee, and conclude by pointing out the position in which Lord Mar stands in consequence of that Report. I reserve a special criticism of the Act for the succeeding Letter. I shall subjoin the Act of 1851 in a note, in order that the reader may have both before his eyes:—

"ANNO DECIMO ET UNDECIMO VICTORIÆ REGINÆ. Cap. lii.

"An Act for the Correction of certain Abuses which have frequently prevailed at the Elections of Representative Peers for *Scotland*.  
[25th June 1847.]

"Whereas by an Act passed by the Parliament of *Scotland*, intituled *An Act settling the manner of electing the Sixteen Peers and Forty-five Commoners, to represent Scotland in the Parliament of Great Britain*, certain provisions were made for electing the said sixteen

Peers to represent the Peerage of *Scotland*: And whereas by an Act passed by the Parliament of *Great Britain*, intituled *An Act to make*  
 Ann. c. 23. *further Provision for electing and summoning Sixteen Peers of Scotland to sit in the House of Peers in the Parliament of Great Britain, and for trying Peers for Offences committed in Scotland, and for further regulating of Votes in Election of Members to serve in Parliament*, further provisions were made for the electing of the said sixteen Peers: And whereas an authentic list of the Peerage of the north part of *Great Britain* called *Scotland*, as it stood the first day of *May* One thousand seven hundred and seven, was returned to the House of Lords by the Lord Clerk Register for *Scotland*, attested by him, pursuant to an Order of the House of Lords, the twenty-second day of *December* One thousand seven hundred and seven, and entered into the Roll of Peers by Order of the House of Lords on the twelfth day of *February* One thousand seven hundred and eight, to which list sundry Peerages of *Scotland* have since been added by Order of the House of Lords at different times, which list of the said Peerage is called at the election of a Peer or Peers to represent the Peerage of *Scotland* in the Parliament of the United Kingdom of *Great Britain* and *Ireland*: And whereas divers of the Peerages of *Scotland* have from time to time become dormant or extinct, and frequent abuses have prevailed by persons assuming Peerages that have become dormant or extinct, and voting in respect thereof at such elections, to which Peerages such persons had no right; and it is expedient in order to prevent such abuses to provide that no person shall be allowed to vote at such elections in right of any Peerage now standing on the said Roll which has been for some time dormant, until his claim thereto shall have been admitted by the House of Lords, and to make further rules and regulations in regard to the proceedings at such elections: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That at all future meetings of the Peers of *Scotland* assembled under any royal proclamation for the election of a Peer or Peers to represent the Peerage of *Scotland* in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, shall not call the titles of any Peerages now standing on the said Roll, in right of which no vote shall have been received and counted since the year One thousand and eight hundred, nor shall it be lawful for the said Lord Clerk Register or Clerks of Session to administer the oaths to any person claiming to vote in right of any of the before-mentioned Peerages, or to receive and count the vote of any such person, or to permit any such person to take part in the proceedings of any such election, until otherwise directed by Order of the House of Lords.

At future elections or Scotch Peers certain titles not to be called by the Lord Clerk Register, nor oaths to be administered, until otherwise directed by the House of Lords.

“II. And be it enacted, That if any vote or claim to vote in respect of any title of Peerage on the Roll called over at any such meeting shall be disallowed by the said House, upon any proceeding had in trial of any contested election, the House of Lords may, if they shall think fit, order that such title of Peerage shall not be called over at any future election ; and in the event of such Order being made by the said House, it shall not be lawful for the said Lord Clerk Register or Clerk of Session to call over the said title at any future election, or to administer the oaths to any person claiming to vote in respect of such title of Peerage, or to receive or count the vote of any such person, or permit such person to take part in the proceedings of any such election, until such claimant or some other person shall have in due course established his right to such Peerage.

If claim to vote be disallowed by House of Lords, title of Peerage not to be called over at any future election, if so ordered.

“III. And be it enacted, That if at any such meeting, any person shall vote or claim to appear or to vote in respect of any title of peerage on the Roll called over at such meeting, and a protest against such vote or claim shall be made by any two or more Peers present whose votes shall be received and counted, the said Lord Clerk Register or Clerks of Session shall forthwith transmit to the Clerk of the Parliaments a certified copy of the whole proceedings at such meeting ; and the House of Lords, whether there shall be any case of contested election or not, may, in such manner, and with such notice to such parties, including the person so voting or claiming to appear or to vote in respect of such title of Peerage and the persons protesting, as the said House shall think fit, inquire into the matter raised by such Protest, and, if they shall see cause, order the person whose vote or claim has been so protested against, to establish the same before the said House ; and if such party shall not appear, or shall fail to establish his claim, the said House may, if they shall think fit, order as is hereinbefore provided in respect to votes disallowed upon any proceeding had in trial of any contested election.

If at any meeting of Peers a protest be made against any claim to vote, Lord Clerk Register to transmit a copy of proceedings to the House of Lords, etc.

“IV. And be it enacted, That whenever any Peer or Peeress shall have established his or her right to any Peerage, or his right to vote in respect of any Peerage, and the same shall have been notified to the Lord Clerk Register by Order of the House of Lords, the said Lord Clerk Register or Clerks of Session shall not during the life of such Peer or Peeress allow any other person claiming to be entitled to the same Peerage to take part in any such election, nor shall it be lawful for the said Lord Clerk Register or Clerks of Session to receive and count the vote of any such other person till otherwise directed by the House of Lords.

Any Peer or Peeress having established their claim, and signified the same to the Lord Clerk Register, the vote of no other claimant to be admitted.

“V. Provided always, and be it enacted, That nothing in this Act contained shall affect the right of any person claiming or who may hereafter claim any Peerage, or shall prevent the right of any person voting or claiming to vote, or having voted or claimed to vote at any

Nothing herein to affect the right of present or future claimants.

election, being subject and liable to every objection to which the same would have been subject and liable before the passing of this Act.”<sup>1</sup>

## “ R E P O R T

By the Select Committee appointed to consider the matter of the Petition of the Earl of Mar and Kellie, presented on the 5th of June 1877, and the Precedents applicable thereto; and to report to the House.

### “ ORDERED TO REPORT,

“ That the Committee have met, and proceeded to consider the Petition of Walter Henry Earl of Mar and of Kellie, presented to the House on the 5th of June 1877. This Petition is printed in Appendix A. to this Report.

<sup>1</sup> “ Anno Decimo Quarto et Decimo Quinto Victoriæ Reginæ. Cap. lxxxvii. “ An Act to regulate certain Proceedings in relation to the Elections of Representative Peers for *Scotland*. [7 August 1851.]

“ Whereas it is expedient to provide a manner in which the death of a Representative Peer for *Scotland* may be certified to Her Majesty, in order that Her Majesty may direct a Proclamation to be issued for the Election of another Peer of *Scotland* in the room of such Peer deceased; Be it enacted by the Queen’s most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Certificate from two Peers of Scotland held to be formal notice of the death of any Representative Peer.

“ I. That a certificate under the hands of any two Peers of Scotland, who shall be at the time of their signing such certificate either Representative Peers, or shall have voted at former elections of a Representative Peer or Peers for Scotland without protest having been made to the reception of their votes, according to the provisions of an Act passed in the Parliament held in the tenth and eleventh years of Her present Majesty, chapter fifty-two, or having been so protested against shall have established their right to vote in respect of their Peerages, shall be held to be formal and sufficient evidence of the death of such Peer for the purpose of issuing such proclamation as aforesaid.

Time of publication of Proclamation for Election altered from 25 days to 10 days.

“ II. And whereas by an Act passed in the sixth year of Her late Majesty Queen *Anne*, chapter twenty-three, it is enacted that every proclamation issued for such elections shall be published as therein provided five-and-twenty days at the least before the time thereby appointed for the meeting of the Peers to proceed to such election: And whereas on account of the increased facilities of communication which now exist such delay is no longer necessary, and it is expedient that the same should be shortened: Be it enacted, That from and after the passing of this Act, instead of twenty-five days, all such proclamations shall be published ten days at least before the time therein appointed for the meeting of the Peers to proceed to such elections, and that the time to be appointed in any such proclamation shall not be later than twenty-five days from the date of such proclamation.

Peers of Scotland may take the oaths, etc., in the Courts of Ireland, and before other officers.

“ III. And be it enacted, That a Peer of *Scotland* may take the oaths and subscribe the declaration required by law to entitle such Peer to vote by proxy or signed list at such elections in Her Majesty’s High Court of Chancery in *Ireland*, or Her Majesty’s Courts of Queen’s Bench, Common Pleas, or Exchequer in *Ireland*, in the same manner and under the same

“The Committee find that by the Resolution of the House of the 26th of February 1875, it was resolved and ordered as follows :—

“That the Petitioner, Walter Henry Earl of Kellie, Viscount Fenton, Lord Erskine, and Lord Dirleton in the Peerage of Scotland, hath made out his claim to the honour and dignity of Earl of Mar in the Peerage of Scotland, created in 1565.

“*Ordered*, That the said Resolution and Judgment be laid before Her Majesty by the Lords with White Staves.

“*Ordered*, That the Clerk of the Parliaments do transmit the said Resolution and Judgment to the Lord Clerk Register of Scotland.

“*Ordered*, That at the future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or

regulations as they may take and subscribe the same in the like Courts in *England*, or may take the said oaths and subscribe the said declaration before the lieutenant of any county in *Great Britain* or *Ireland*, or any member of Her Majesty's most Honourable Privy Council in *Great Britain* or *Ireland*, or any judge of a county court in *England*, or any British ambassador or minister accredited to any foreign court, or the secretary of any such Embassy or Legation, or the Governor, Lieutenant-Governor, or Officer administering the Government of any of Her Majesty's plantations, colonies, or possessions abroad, or any of Her Majesty's Judges residing therein ; and every such person before whom the said oaths shall be taken and the said declaration subscribed shall certify the same in a certificate attached to the declaration, which shall be produced, together with the proxy or signed list of the Peer, at such election : Provided always, that nothing herein contained shall be construed to prevent any Peer taking such oaths and subscribing such declaration in any manner at present competent by law.

“IV. And whereas by the before-mentioned Act passed in the Parliament held in the tenth and eleventh years of Her present Majesty, chapter fifty-two, it is enacted, that at all future meetings of the Peers of Scotland for such elections the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, shall not call the titles of any Peerages standing on the Roll in right of which no vote shall have been received and counted since the year One thousand eight hundred, with other provisions connected therewith, and it is expedient that the principle on which the said enactment is founded should be continued and extended : Be it enacted, That after every meeting of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, shall transmit to the Clerk of the Parliaments the titles of any Peerages called at such meeting in the right of which no vote shall have been received and counted for fifty years then last past or for any longer period, and on receiving an order from the House of Lords to abstain from calling such title at future meetings for such elections it shall not be lawful for the said Lord Clerk Register or Clerks of Session to call such title at any subsequent meeting, or to administer the oaths to any person claiming to vote in right of such Peerage, or to receive and count the vote of any such person, or to permit any such person to take part in the proceedings of any such election, until otherwise so directed by order of the House of Lords.”

Titles of  
Peerages in  
right of  
which no  
vote has been  
given for  
fifty years  
not to be  
called at  
elections, if  
the House of  
Lords shall  
so direct.

Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings in such election.'

"The House came to these Resolutions upon the Report of the Lords Committees for Privileges, by which Report it appeared that John Francis Erskine Goodeve Erskine, styling himself Earl of Mar, had appeared before the Committee, and had been heard on a petition in opposition to the claim of the said Walter Henry Earl of Kellie to the Earldom of Mar. The ground of such opposition was, that the said Mr. Goodeve Erskine denied that any Earldom of Mar was created in 1565, and alleged that he was entitled, as heir of line of Isabel Countess of Mar, to the Earldom of Mar, which he contended was held by her in her own right in 1404.

"The present Petition of the Earl of Mar and Kellie states that at a late meeting of the Peers of Scotland, on the 22d of December 1876, for the election of two Representative Peers, Mr. Goodeve Erskine presented himself to the meeting, and protested against the Petitioner answering to the title of Earl of Mar, and tendered his vote as the Earl of Mar called on the Roll.

"The Petitioner prays that the House will order and direct that the Lord Clerk Register of Scotland, or the Clerks of Session officiating at the elections of Peers of Scotland shall at all future elections of Peers of Scotland call the title of Earl of Mar on the Roll used at such elections in the precedence declared and established under the Resolution and Judgment of the House, and that the title of Earl of Mar may not hereafter be called at such elections in any other place.

"It appears from the evidence taken before the Select Committee of this House on the Representative Peerage of Scotland and Ireland in the Session of 1874, that the Roll of Scotch peerages called over at an election is made upon the basis of what is called the 'Union Roll.' This Roll is described in the Act 10 and 11 Vict., c. 52, hereinafter referred to as an authentic list of the Peerage of Scotland as it stood in 1707, returned to the House of Lords in 1708, to which sundry Peerages of Scotland have since been added by the House of Lords at different times. The Roll is looked upon as a Roll, not of individuals, but of peerages, and the Earldom of Mar is entered on this Roll as the fifth Earldom of Scotland before earldoms which were created earlier than 1565.

"It appears from a return made to the House, and ordered to be printed on the 17th of April 1874, that where since the Union a title has been established to a Scotch Peerage not on the Union Roll, the

peerage to which the title has been so established has been placed upon the Roll in its proper precedence according to the Resolution of the House. And, on the other hand, where a title has been established to a peerage already entered on the Roll, a note has been made opposite the peerage on the Roll stating the title that has been thus established to it.

“It appears from the Resolutions of the House of the 26th of February 1875, already mentioned, that the Earldom of Mar to which the Petitioner is stated to have made out his claim is therein mentioned to have been created in 1565, and the order to the Lord Clerk Register is ‘to call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland called at an election.’ It may be a question whether, under this Resolution, it was the duty of the Lord Clerk Register to call the Earldom of Mar in the place in which the Earldom of Mar actually stands on the Union Roll, or in what would be the place of an Earldom of Mar created in 1565 ; but it appears that the Lord Clerk Register called it at the late election in the place in which it actually stands on the Union Roll.

“Although the petition of the Earl of Mar and Kellie prays that the title of Mar may be hereafter called in the precedence established under the Resolution of the House, that is as an earldom created in 1565, and not in any other place, yet it is obvious from the petition that what the petitioner desires is that Mr. Goodeve Erskine should not be allowed to answer to the title of Mar whenever it may be called, or to tender his vote.

“It is clear that no mere alteration of the place on the Roll where the title of Mar is called would have this effect. It would be in the power of Mr. Goodeve Erskine to answer to the name in whatever order of precedence it was called, or to claim to vote as Earl of Mar, irrespective of any calling of the name.

“The Committee have not been able to discover any precedents of Orders made by the House for altering the order of precedence of the Peers of Scotland on the Union Roll. There are, as already stated, precedents of the insertion of names omitted from the Roll ; but there are no precedents of orders made for changing the order of names already on the Roll. The Committee do not, however, desire to express an opinion that in a proper case the House would not have the power to make an order to this effect.

“The Committee have been furnished, on the other hand, with precedents, which will be found in the Appendix B. to this Report, of orders made by the House forbidding individuals to take upon themselves the title or the dignity of particular Scotch peerages until their claim shall have been allowed in due course of law, and declaring that they should not be admitted to vote by virtue of a title thus improperly claimed at the election of any Peers of Scotland.

“These precedents appear to be included between the years 1761 and 1776, and they are all anterior to the Report of the Committee of the House made in 1847, as to the question of what steps should be taken to prevent persons from voting at elections of Representative Peers of Scotland who are not entitled to do so.

“This Report of 1847 is printed as Appendix C. to this Report. The Report was followed by the Statute 10 and 11 Vict., c. 52, and this Statute appears to the Committee to have now provided a definite and practical mode of preventing the vote of any person improperly claiming a title of Peerage in Scotland being received or counted at any election.

“Under the 3d Section of this Statute, if, at a meeting for the election of a Representative Peer, any person shall vote, or claim to appear or to vote, in respect of any title of Peerage on the Roll called over at such meeting, and a protest against the vote or claim be made by two or more Peers present whose votes shall be received and counted, the Lord Clerk Register is to transmit to the Clerk of Parliaments a certified copy of the whole proceedings, and the House of Lords may order the person whose vote or claim has been so protested against to establish the same before the House, and if he shall not appear, or shall fail to establish his claim, the House may order such Title of Peerage not to be called at any future election, and in such case the Lord Clerk Register shall not call the title at any future election, or receive or count the vote of the person claiming the title, or permit him to take part in the proceedings of any such election until he shall have in due course established his right.

“Viewing the claim of Mr. Goodeve Erskine as a claim to an Earldom of Mar older than and different from that which, according to the Resolution of the House, was created by Queen Mary in 1565, it would, in the event of Mr. Goodeve Erskine claiming at any future election to vote in respect of such older and different Earldom of Mar, appear to be competent for any two Peers to protest against his claim, and the proceedings would thereupon be transmitted to the House, and it would appear to be in the power of the House to call upon Mr. Goodeve Erskine to establish his claim to such older and different Earldom, and in the event of his not doing so, to direct that no such older or different Earldom of Mar, and no Earldom of Mar other than that created in 1565, should be called at any future election, and that no person should have his vote received or counted in respect thereof.

“Under these circumstances, the Committee are not disposed to recommend that any order should be made on the Petition of the Earl of Mar and Kellie. They think it better to leave the Statute to which they have referred to be brought into operation, if necessary, at any future election of Representative Peers, in case any persons interested should be advised to resort to its provisions.

“*27th July 1877.*”

This Report was presented to the House of Lords, and ordered to be printed (as previously stated) on the 27th July 1877; and the House thus placed the seal of its approbation and acceptance of the views expressed by Lord Selborne, in part, and by Lord Cairns *in toto*, upon the important question discussed in the debate of the 9th July upon the Duke of Buccleuch's Resolution. The especial feature of the Report is that, while recognising the existence of the Earldom of Mar as a new creation, and not a restoration, in the person of John Lord Erskine in 1565, it admits that it may be possible that the heir-general may have a right to the ancient earldom, and points out a method, as provided by the Act of 1847, somewhat cumbersome and roundabout, and otherwise, as I shall show, objectionable—by which he may procure a consideration of his pretensions before the House of Lords as a judicial tribunal, the Committee, it is to be remarked, avoiding any suggestion that Lord Mar should claim by petition to the Crown, as Lord Kellie had done, and thus bring his case before the House by reference from the Sovereign, and before the Sovereign as final judge. I hold, of course, that Lord Mar is in possession, and has no occasion to claim; but a petition to the Crown is what the Committee should have recommended, unless it was still determinedly bent on representing Mr. Goodeve Erskine as a claimant. Apart from this, the spirit of the Report was so far favourable to Lord Mar, and gave expression to the feeling which had been growing up, as I have shown, between April and July in 1877, and which had been acknowledged by Lord Redesdale and Lord Kellie himself, and by the Duke of Buccleuch, in the *salvo* appended to his original Resolution, viz., that the decision by the Resolution of 1875 did not necessarily extinguish the original earldom, and that there thus might conceivably be two Earls of Mar. I am sorry to say that I cannot myself admit the possibility; for, if the unconfirmed charter of Isabel Countess of Mar, 12th August 1404, was valid, according to the contention of Lord Kellie, and of the Crown between 1457 and 1565, then the original earldom was lawfully resigned by Alexander Stewart Earl of Mar to James I., lawfully regranted to him, and became extinct on his death, and the existing earldom was thus a new creation in 1565; while, if the confirmed charter of 9th December 1404 was valid, accord-

ing to the contention of Lord Mar, and by the final judgment of the Court of Session in 1626, then the resignation and regrant to and by James I. were illegal, the succession of Sir Robert Erskine as Earl of Mar in 1438 was in due course of law, and the reappearance of the earldom in 1565 was through restitution *per modum justitiæ*, and there was no new creation in that year. It is impossible that the two dignities can co-exist; and the judgment of the Court of Session in 1626 is conclusive in favour of the earlier one, through its affirmation that the charter 12th August 1404, the foundation-stone of Lord Kellie's claim, was not valid.

Fully admitting therefore that the House of Lords had come to entertain a more favourable view of Lord Mar's position than was the case at the time of the Order of the 26th February 1875, and previously to the Duke of Buccleuch's Resolution in 1877, I am, on the other hand, constrained to state that his position at this latest stage of events has been rendered more embarrassing than ever, and, as I shall show hereafter, through a misconception of the power conferred on the House by the Act of 1847. His position at the present moment is as follows:—A Peer of Scotland, by the law of Scotland—a man who has never claimed, nor been under the necessity of claiming, a dignity of which he is in legal possession—and who does not therefore stand before his Sovereign and his brother peers as a claimant, an unsuccessful claimant, as he is represented by Lord Kellie—a peer whose status has not been in the slightest degree legally affected or compromised by anything which has taken place in the House of Lords, or out of it—the so-called cancelling of his presentation at Court having nothing of a judicial character, as has been contended in the discussion at Holyrood—up to the present moment. Lord Mar, the Peer in question, has now been placed in the position, through a well-intentioned Report of a Select Committee, anxious to afford him an opportunity of establishing his rights, which the House of Lords still persist in maintaining to be in suspense (if they exist at all) till recognised by their own, not the Queen's, authority—this peer of Scotland has been placed in the position, I say, of being compelled to abstain from the exercise of his right of voting as a Scottish peer by the certainty that if he tenders his vote, two peers will be prepared to

protest against it, to the effect of dragging him before the bar of the House of Lords, as a judicial tribunal, and the further certainty that, till the House formally abjure its traditional rules, it will decide against the law of Scotland and himself, or, in the event of his non-appearance to the summons, practically expunge the name and title of his ancient dignity from the Union Roll, all in conformity with the provisions of the Act of 1847, thus assumed—I shall show, erroneously assumed—to be applicable to his case. So long, in a word, as the present intervention of the House of Lords remains unwithdrawn, and the Act of 1847 continues to be understood in the sense put upon it by the Select Committee, it is impossible to doubt that the provisions of the Act will be brought to bear against him; and Lord Mar is therefore precluded by this attendant and imminent risk from exercising his right and privilege of voting, as by law entitled. The case is, I should think, unparalleled, not merely through its hardship, but the circumstance that the House is disposed to be favourable, but bound hand and foot (as they think) by their tradition, from the coils of which it needs indeed a force stronger than that of Laocon to break free. Meanwhile the Lords have replaced the house of Mar—so far as a series of words and actions which appear to me to have been *ultra vires* from first to last can have such effect—in the position of the heirs of the Countess Isabel between 1435 and 1565; the Lord Mar of 1875 standing in precisely the same situation as the Robert Earl of Mar whom the Government would not recognise as such after he had been lawfully served heir to Isabel in 1438, but whom Parliament in 1587 and the Court of Session in 1626 recognised as Earl. It is to be hoped that the period of iniquity and oppression may not be similarly prolonged with that which Queen Mary deplored and put an end to in 1565. Is it beyond hope that Her Majesty may intervene in the spirit of her ancestress Queen Mary, by restoring her recognition of the status of the Earl of Mar implied in his presentation at Court? Meanwhile the continued, or rather crystallised, refusal to receive Lord Mar's vote is a matter touching the privileges and independence of the Scottish Peers, and may injuriously affect the interests of Representative Peers; because, independently of the deprivation to the Peers of the presence and participation of Lord Mar at and in the elections

at Holyrood, it might well be that a grave question might arise if an equal number of votes appeared for two peers, while there would have been a majority for one of them if Lord Mar were not debarred from the legal exercise of his vote. Her Majesty herself, who is presumed, as a feudal Sovereign, to know every great vassal, her peer, might well ask in the present instance, "Why is the man who by the justice of my ancestress Queen Mary was restored to one of the most ancient dignities of my realm, and whom not only the Supreme Civil Court of Scotland, to which my ancestor James v. committed the guardianship of the legal rights of the Peers of Scotland, along with those of all other subjects of my ancient kingdom, but the standing laws of the realm, warrant to me as Earl of Mar,—why is he excluded, apart too from my cognisance as the fount and guardian of honours, from his seat among my loyal vassals, his brother peers at Holyrood?"

While such is Lord Mar's position—while the Report of the Select Committee of 1877 proceeds upon a wish that full justice should be done him—and while the Resolution of the Duke of Buccleuch bears the same testimony, to which Lord Redesdale and Lord Kellie (through his agents) have equally adhered, it is impossible to doubt that all parties have acted in perfect good faith. I ventured to surmise as much in the paper I wrote, and which Lord Redesdale criticised in the House of Lords, at the moment when Lord Kellie's petition reached me in April, and before the change had taken place in the general opinion of himself and his friends, which found expression in the *salvo* added to the Duke of Buccleuch's Resolution. It was an apprehension of the influence exerted by the Duke's intervention which induced me to write and circulate that paper. "The name of the noble Duke," I said, "is such a tower of strength; the confidence that he would recommend nothing which he does not think just and right is so universally and justly entertained, that I am under great apprehension lest a grievous wrong should be unwittingly done, and the House placed in a false and embarrassing position, through any action taken on the prayer of Lord Kellie's petition, and more especially on the final clause in the petition." In the same spirit I added, after submitting that the House had no power to interfere with the Union Roll: "I will only pause to observe

upon the sad and unparalleled peculiarity of this claim," Lord Kellie's, viz., "that, while cruelty and injustice have been, and are being actively perpetrated, all parties have been, and are acting in perfect good faith; Lord Mar struggling against the accumulated strength of his opponents, in defence of his interest; Lord Kellie and the Duke of Buccleuch naturally reposing faith in the opinion of the noble and learned Lords who advised the Committee for Privileges; and the noble and learned Lords acting on the traditional views, and applying the traditional rules and principles of their predecessors in Scottish peerage cases since 1762 and 1797; men, all of them, honourable and true, and who would shrink from the idea of crushing down an innocent man, yet who are betrayed and impelled into doing so by the hereditary Nemesis of past generations." A step in approximation towards better things—justifying these anticipations—has been taken through the Report of the Select Committee which followed upon the debate on the Duke of Buccleuch's Resolution recognising the possibility of a right being still in Lord Mar; and it only needs one step further, a frank acknowledgment that by Scottish law he is under no necessity of claiming what he is actually in possession of, to enable him to tender his vote without risk at Holyrood. Meanwhile, as I have already shown, the Act of 1847 hangs over his head, and renders such action *pro tempore* impossible.

## LETTER XIV.

## THE ACT OF 1847 (10 AND 11 VICT. c. 52).

THE Statute of 1847 will be the exclusive subject of the Letter I have now arrived at. It is already before the reader; but its import and importance as bearing primarily on the Earldom of Mar, and more remotely on the privileges and independence of the Scottish Peerage, cannot be appreciated without ascertainment of its origin, nature, and sanctions, and of the length and breadth, depth and height of its authority and validity. An Act of Parliament has its history and *rationes*, as well as any other landmark in existence; and these are well worthy of attention in regard to the Statute of 1847.

## SECTION I.

*Report on which the Act proceeded.*

During many years, many generations previously to the passing of this Act of 1847, many annoyances had arisen from the assumption of dormant and extinct titles in the Peerage of Scotland by pretenders having no right to such, and the tendering of votes by such persons in virtue of those titles at the elections of Representative Peers at Holyrood, votes which, although protested against, still stood and weighed in the balance. The proper Court for the correction of such abuses would have been the Court of Session; but no one seems to have thought of proceeding beyond a simple protest; although, as I have already shown, such protest was to the Court of Session, as the supreme tribunal by Scottish law. The House of Lords had no authority to interfere. The most conspicuous of these cases of undue assumption and voting were those of a certain Crawford, who assumed the surname of Lindsay and the title of Earl of Craw-

ford subsequently to the death of George Earl of Crawford in 1808; and of a certain Humphreys, who assumed the surname of Alexander and the title of Earl of Stirling, both of these claims being supported by forged evidence. At the election of Lord Gray on the 17th March 1847 at Holyrood, a claimant having voted as Lord Colville of Ochiltree—this being the case referred to by Lord Mansfield in his speech in 1877, the Earl of Selkirk protested against the reception of his vote, “on the ground that as the right of the claimant of the title of Lord Colville had not been admitted by the House of Lords, it was contrary to Acts of Parliament to receive his vote.” The Clerks of Session replied that “they were not aware of the existence of any Acts of Parliament of the kind or description referred to by Lord Selkirk; while the Resolution of the House of Lords, 13th May 1822,” *i.e.* Lord Rosebery’s Resolution, afterwards rescinded at the instance of the present Duke of Buccleuch—“could not be held to apply to the case before them.” It was this last incident which occasioned the inquiry and the legislation of 1847.

A Select Committee having been appointed, with Lord Ardrossan (the Earl of Eglinton) in the chair, the Committee took the evidence of the two gentlemen mentioned in my brief notice of the Act in the preceding Letter, Mr. Russell (who had acted as Clerk of Session in the recent election at Holyrood) and Mr. David Robertson—a most estimable man, a member of the firm of Spottiswoode and Robertson, peerage agents, and who had been engaged in that capacity in almost every great Scottish peerage claim since the memorable election of 1790. It was he who reported the speech of Lord Rosslyn (or Loughborough) on the Glencairn claim in 1797, and appeared to give his report in evidence in the Montrose claim in 1853, when his appearance created much interest among all present. But it is with no disrespect to his memory that I state that, born and bred under the influence of the traditional practice of the House of Lords, as initiated by Lords Hardwicke and Lord Mansfield in 1762 and 1771, the key-note of which was the assertion of the absolute authority of the House of Lords in Scottish peerages, with but faint and hardly perceptible recognition of the jurisdiction of the Sovereign, so vigorously vindicated in the Wiltes case by Lord Chelmsford (who was

also a member of the Select Committee of 1877), Mr. Robertson was a very unsafe guide for the Select Committee and the House of Lords to follow through the problem of 1847; while it is a very singular and unfortunate fact that the Select Committee abstained from seeking the advice on that occasion either of the Lords of Session or of the law officers of the Crown for Scotland, who might have advised them with more authority, and from a broader basis of Scottish and constitutional law,—this being, in fact, the same complaint against the Report of 1847, as that which Lord Mansfield pressed home with so much effect in the Debate of 1877, and to which neither Lord Selborne nor Lord Chancellor Cairns ventured to reply.

Mr. Russell's evidence is interesting, but occupied chiefly with official and practical details, upon some of which I think his views are questionable; but Mr. Robertson's dealt with the suggestion of a practical remedy for recent abuses; and my impression from the evidence is, that he was invited to appear for the express purpose of eliciting his views, and obtaining his assistance in the matter. I therefore insert his evidence in full from the Minutes:—

“74. You are a Parliamentary agent?—Yes; and a conveyancer.

“75. You have been long in practice?—I have been long in practice in London.

“76. You are very much acquainted with the proceedings which have taken place from time to time in the elections of Representative Peers for Scotland?—Generally I am well acquainted with them.

“77. You are quite aware that very great inconvenience has arisen from persons voting who, it is conceived, have not a right to vote, and who have been proved afterwards to have no right to vote?—I have seen several instances of it myself.

“78. Have you any suggestions to offer to the Committee which would obviate those inconveniences, and put an end to the abuses which have occurred at those elections, and which are still continuing to occur?—I have from time to time thought upon the subject. Those difficulties have arisen a long while ago. I think the first case was in 1731, in the case of my Lord Lyle; and they have been going on ever since. There have been various Resolutions of the House made upon the subject, none of which seem to have abated the evil. I am inclined to think that an Act of Parliament might be the best way of getting rid of those difficulties.

“79. Supposing the Committee to be of opinion that it is expedient

that an Act of Parliament should be passed, what provisions do you think such an Act of Parliament ought to contain?—There are two classes of those parties who have given annoyance at Peers' elections. There is one class who have petitioned the Crown, and who have taken proceedings before the Committee of Privileges. There is another class, who have never petitioned the Crown; and I presume that they are just as difficult to deal with as the other. The former class, it occurred to me, might be disposed of very easily, namely, by a Parliamentary enactment that all those parties who have claimed a peerage from the Crown, whose claims have not been disposed of in their favour, should have no right to vote, and should be prevented from tendering their votes under a penalty. With regard to the other class, it has occurred to me that they might also be dealt with something in this way; supposing it was enacted that objections might be taken to the tendering of a vote at any election of Peers by such persons who are well known; in fact, I believe it is universally known, who are Peers of Scotland, and who are pretenders; but upon any of those parties who are of that last class coming forward, it appears to me that objections might be taken to their tendering their votes. Such objections might be very short, merely stating that they objected to the tendering of those votes. If two Peers concurred in those, and gave in their objections to the Lord Clerk Register or his deputies officiating at the election, it appears to me that that would then be a ground for refusing to receive the votes on the tendering of the votes at such election, if an Act of Parliament declared that. What further occurred to me upon the subject was, that it should not be an absolute bar to them, but that it should force them to go to the House of Lords to have their titles examined and adjudged, and that until they did so they should be prohibited from tendering their votes under a penalty.

“80. Supposing there were two pretenders present, and that those pretenders having taken the oaths chose to object to any one of our votes, that would equally prevent our voting?—So it would. You might increase the number who should be required to concur in the objection.

“81. But the number of pretenders might increase accordingly?—The increase of pretenders might be more difficult.

“82. When do you propose that those objections should be given in?—Before they are sworn.

“83. During the currency of the proceedings at the election?—At the time when the title that they assume is called; that would be the proper time to take the objection.

“84. In that case the plan that you propose, and suppose it to be effective for the purpose, would only cure half the evil; because half the scandal, and perhaps the worst half of the scandal, is the presence of those parties interrupting the proceedings at the election?—I

certainly have not turned my mind to that point. My object was to prevent their voting at the election.

“85. Would not what you propose have the effect of enabling any pretender to a peerage to challenge the vote of any Peer who might vote at the election table at Holyrood House ; so that any Peer might be called upon by one of those pretenders to prove his title before he voted ?—I have assumed that it would be necessary for two Peers to object. It might, however, be necessary for a greater number of Peers to object ; and in such a case it would be scarcely possible to have so many pretenders as were necessary to object.

“86. Might not that plan lead, in a contested election, to parties agreeing to protest against Peerages undoubtedly good in the persons of the individuals present ?—Certainly, that is a possible case ; and in the great election of 1790 a great many objections were so taken. A great many objections were taken against Peers who were ultimately found to have a good right.

“87. And who had never been questioned before ?—And who had never been questioned before.

“88. Would not the effect of that be a very great injustice and hardship to those upon whom it might act at that election ?—Certainly.

“89. Were not the Earl of Errol of the day and the Lord Napier of the day both brought to the bar of the House of Lords to prove their right to vote at the election of Peers for Scotland ?—They were ; and Mr. Spottiswoode, with whom I was, defended them both successfully.

“90. You state that one class of persons implicated in this question are those who petition the Crown, and who vote while their petition is pending, and before the claim is adjudged. Do you not know that at present the universal practice in those cases is for the Clerks not to receive such a vote where the claimant has petitioned the Crown ?—I was not aware of that fact.

“91. In your opinion, would it be better to provide a remedy by Act of Parliament, or, in your judgment, could it be effectually and legally done by a Resolution in the House of Lords ?—I have seen so much of Resolutions being passed by the House of Lords which have proved ineffectual, that my opinion, so far as I can humbly form an opinion, would be in favour of an Act of Parliament. I have made a draft of a Bill connected with this subject, embodying the suggestions which I have ventured to throw out, which, if it is the pleasure of the Committee, I will deliver in.”

Which draft was delivered in, and received by the Committee accordingly.

This examination took place on the 7th May 1847, and the Report of the Select Committee was presented to the House

and ordered to be printed on the 4th June. The Report is short but interesting, and I give it in full :—

“That the Committee have met and considered the subject-matter referred to them, and have examined witnesses in relation thereto.

“The Committee find that there is no adequate authority vested in any quarter for the rejection of votes, however dubious or invalid, at the election of Representative Peers for Scotland. This was manifested at the last election (as well as on many former occasions), on Lord Gray’s being returned a Representative Peer in the room of the late Lord Rollo, when a person assumed the title and exercised the privileges of Lord Colville of Ochiltree, a peerage generally supposed to be extinct, and in respect of which other claimants at former elections had been ordered by the House of Lords not to vote until they had proved their right thereto.

“The frequent practice of persons acting in the same way at these elections is so notorious, that it is unnecessary to adduce further proof of the fact ; while the journals of the House on reference to them will exhibit the hardship, injustice, and expense to which many candidates for the representation of the peerage have been exposed, in consequence of votes of a similar character being thus received and counted.

“It is believed that the Peerage of Scotland is the only body invested with important privileges in this kingdom, without any provision being made for testing the right of those who may claim to exercise them ; whereby not only the dignity of this branch of the Peerage is compromised, but the return of Representative Peers to the House of Lords may be affected, and the public subjected to frauds by the conduct of persons acting as Peers of Scotland, who are not justly entitled to the honours they assume. This state of things has been long felt to be a great evil and grievance, and various remedies have been proposed ; some of a general and comprehensive nature, others in reference to particular cases brought before the notice of the House ; but all these have either been abandoned before they were matured, or have been found insufficient for correcting the abuses which have been described. The House by their Resolutions of 1822 attempted to prevent the intrusion of all persons claiming to vote by collateral succession, without due authority ; but these Resolutions have proved inoperative, even in many cases of this description, and wholly so with regard to those who claim by lineal descent. The abuses before referred to, therefore, continuing at the election of the Scottish Representative Peers, a Select Committee of the House was appointed in 1832, which came to several Resolutions with a view of providing a remedy for this evil, requiring compliance with certain forms on succession to Peerages of Scotland before the right of voting was admitted ;

but these were subsequently thought so liable to objection that they were not pressed for adoption on the House.

“The Committee having thus inquired generally into the nature of the evils complained of, and what had heretofore been done in relation to them, proceeded to consider whether the remedial measures which they might propose should be carried into effect by Resolutions of the House or by legislative enactment. As the provisions by which these elections are regulated and conducted have been settled either by the Treaty of Union between England and Scotland, or by an Act of the Parliament of Scotland at the period of the Union, which is made part of that Treaty, or by an Act of the British Parliament passed immediately after the Union, in accordance with the twenty-second Article of the Treaty, which declares that the Representative Peers of Scotland shall be elected in such manner as is settled by the before-mentioned Act of the Parliament of Scotland, ‘until the Parliament of Great Britain shall make further provision therein,’ the greatest doubts must arise whether any restrictions upon the right to vote as at present exercised by persons claiming to be Peers of Scotland can be legally enforced otherwise than by the authority of an Act of Parliament.

“The Committee then deliberated on the proper means to be afforded by such an Act for securing the object in view. This, though attended with considerable difficulty, has been executed with the anxious desire, on the one hand, to correct the abuses which have so long prevailed at the elections of the Peers of Scotland, and, on the other, to effect this salutary purpose with as little individual pressure as possible. The Committee have instructed the Chairman to lay on the table of the House a Bill framed according to these principles, which they venture to recommend to its favourable consideration.

“And the Committee have directed the Minutes of Evidence, together with an Appendix thereto, to be laid before your Lordships.”

The Bill in question was introduced in the House of Lords on the 18th, and after passing through the House of Commons, etc., all in the usual form, became law as the 10 and 11 Victoria, cap. 52, on the 25th June 1847. It has been given *in extenso* in the preceding Letter, and the reader will now be enabled to consider the Act, and the evidence and Report it proceeded upon in connection, and to appreciate the actual tenor of the Act, and its applicability to the case of Lord Mar, as affirmed by Lord Selborne and Lord Cairns in their speeches in the recent debate, and recommended by the Select Committee which sprang out of that debate in their Report in 1877.

## SECTION II.

*Act not applicable to Lord Mar.*

What I have now to submit is that even were Lord Mar content to accept the conditions presented to him by the Report of the Select Committee, and descend from his high place of legal possession as Earl of Mar to the bar of the House of Lords, in the capacity virtually of a claimant, through the mechanical operation of a protest by two Peers against his vote, should he attempt to exercise his privilege at Holyrood, and a summons by the House of Lords to appear and establish his right before them as judges, all as provided by the machinery of the Act of 1847—the step on his part and the intervention of the House of Lords would be equally unavailing in law, for the simple reason that he does not fall within the category of persons to whom the Act in question has reference, and cannot therefore take advantage of it, if he wished to do so; while the same reason equally precludes the machinery of the Act being put in force against him—I mean in law, not in practice, a very different thing—should he venture to vote, as at present he is precluded by the attendant risk from doing.

I have already drawn attention to the words in the Report of 27th July 1877, “the vote of any person *improperly claiming a title of Peerage in Scotland*,” and we have now before us the circumstances under which and to meet which the Act was passed, viz., the assumption of dignities by mere pretenders, and the voting of such pretenders at elections at Holyrood. And this is emphasised in the preamble to the Act of 1847, which is not cited by the Select Committee of 1877, and must have escaped their notice, as is more probable from the non-insertion of the Act in the Appendix.

The words are as follows:—“Whereas divers of the Peerages of Scotland have from time to time been *dormant or extinct*, and frequent abuses have prevailed by persons assuming peerages that have become *dormant or extinct*, and voting in respect thereof at such elections, to which peerages such persons had no right”—the cases specially referred to being those of the Crawford, Stirling, Colville of Ochiltree, and Annandale

pretenders,—“and it is expedient, in order to prevent such abuses, to provide that no person shall be allowed to vote at such elections in right of *any peerage* now standing on the said Roll *which has been for some time dormant*, until his claim thereto shall have been admitted by the House of Lords; and to make further rules and regulations with regard to the proceedings at such elections, . . . Be it therefore enacted,” etc. etc. I pause for some observations here :—

It may be suggested (the reader can refer back to the Act, as printed in Letter XIII. *supra* pp. 213-216) that Section 3 of the Act which the Report of the Select Committee specifies and founds upon as providing for Lord Mar's case, is independent of the preamble,—and the absence of any allusion to the preamble in that Report would appear to indicate that such was the view of the Select Committee (supposing, that is to say, that the Act actually passed under their eyes); but the two alternatives thus suggested are almost equally inimical to the applicability of the Act, for the following reasons.—

1. Assuming that Section 3 of the Act is governed by the preamble, the conditions of its applicability are that the peerage in right of which any one claims to vote shall have been “dormant or extinct,” or “for some time dormant”—while it assumes that those who have claimed to vote in respect of such peerages have “had no right” to those dignities. But by the law of Scotland governing the succession to dignities, as elsewhere shown in these Letters, the Earldom of Mar, whether the original Earldom or the newly-discovered Earldom of 1565, has never been for one instant “dormant or extinct,” much less “for some time dormant;” inasmuch as the present Earl succeeded at once *jure sanguinis* to his uncle, the late Earl, as next of kin, at the moment of the death of the latter; and this by law (and as well in the original as the supposed earldom of 1565, as pointed out by the law officers of the Crown in 1874)—independently of the fact that he was recognised and received everywhere as Earl of Mar without a shadow of doubt till the moment when Lord Kellie claimed an Earldom of Mar of later creation—a claim recognised by the Resolution of 1875, but which, it is now admitted by the House, leaves

the original dignity unaffected, and therefore *ex necessitate* in the legal heir, although the House refuses to recognise the Scottish law of succession, as being in contradiction to their private rule dating from the Cassillis Report of 1762. Lord Mar, in a word, has been in continuous and recognised possession as Earl of Mar—the succession of the earldom restored in 1824 has never been for a moment interrupted—the dignity has never been dormant during the whole intervening period till the present instant. The Act of 1847 is thus, as read by the preamble, inapplicable *ex terminis* to the case of Lord Mar. On the other hand,

2. If it be held that Section 3 and other Sections of the Act are not governed by the preamble, then it is for the Peers of Scotland to take notice that by the terms of the Section in question, any two or more peers may protest against the vote of any third peer who may have inherited his dignity in direct succession from any number of generations, and thus empower the House of Lords—for there is absolutely no protection, or room for discrimination apart from the preamble—to “inquire into the matter raised by such protest, and if they shall see due cause, order the person”—the peer in possession being thus qualified, on the same footing with the pretenders spoken of in the preamble—“whose vote or claim has been so protested against”—the Duke of Rothesay’s, for example, “to establish the same before the said House; and if such party shall not appear, or shall fail to establish his claim, the said House may, if they shall think fit, order as is hereinbefore provided in respect to votes disallowed upon any proceeding had in trial of any contested election,” *i.e.* as in Section 2, may “order that such title of peerage shall not be called over at any future election,” etc., etc. There is more than one Scottish peer respecting whose right to his dignity grave doubts have been entertained by Scottish lawyers: and it is perfectly conceivable that such a course as that suggested by the Act might be adopted either on such or slighter grounds, if, that is to say, the provision of Section 3 stands by itself, uncontrolled

by the preamble of the Act as limiting the power of protest (in the way suggested) to cases of such pretenders as are there specified. That this danger was foreseen by the Chairman of the Select Committee which furnished the Report upon which the Act of 1847 proceeded, has been shown by the evidence of Mr. David Robertson already given. The introduction of the words "or more"—so that the clause runs "two or more peers present"—and the qualification "whose votes shall be received and counted"—as the necessary *quorum* to establish the right of challenging a claim to vote, as above contemplated, constitutes, I conceive, but a weak safeguard, unless Section 3 be controlled by the preamble, as I submit it is. It is impossible, I apprehend, to imagine that the framers of the Act, or the Parliament which passed it, could have intended to put power like this into the hands of the House of Lords, unchecked by words limiting its exercise to the case of the pretenders against whom the Act was avowedly levelled; while, if they did so contemplate and act, such enactment was *ultra vires* even of Parliament itself, as I shall show hereafter.

I have only to add that if the Act of 1847 had ever been deliberately read and considered by the Select Committee of 1877—and my only cause for doubting it is its omission from the Appendix to their Report—then (I speak with diffidence, but I cannot conceal my conviction that) the Select Committee would have seen that Lord Mar's case does not fall within the compass of the Act *ex terminis*, on the grounds above stated. The private rule and presumption of the House of Lords in favour of heirs-male, invariably enforced against the Scottish law of succession in claims which come before the House by reference from the Crown, could not be enforced by the Select Committee in a case like that of Lord Mar, which has never come before the House by reference from the Crown, and where the right to vote, upon which the challenge turns, is a matter especially dependent upon the Scottish law of succession in question. By that law the Earldom of Mar, the only Earldom of Mar on the Union Roll, and which is descendible to heirs-general and has legally devolved on the present tenant, has

never been “dormant or extinct,” and *a fortiori* never “for some time dormant”—nor has it been “improperly claimed” or assumed by the heir-general—since the death of the late Earl, to whom the present succeeded as next of kin in 1866.

I have a further and vital exception to take on constitutional grounds to the validity and applicability of the Act of 1847 in any case whatever; but this I defer, confining my view at present to the special case of Lord Mar.

Meanwhile, it will now be evident that Lord Mar can neither be benefited nor injured in a legal point of view by the Statute of 1847. It simply does not apply to him *ex terminis*, as I think will not be disputed by any who may have read this Letter. It will be Lord Mar’s wisdom—confident in the ultimate triumph of truth over prejudice—to abstain from placing himself in the position of having the ordeal enforced upon him; but if that were attempted, I have little doubt that it would be found that the weapon which the House of Lords have brought forth from their armoury will prove unsound and unserviceable against him.

## LETTER XV.

## RESULTS OF DEBATE AND REPORT OF 1877.

WE have hitherto considered the Debate of the 9th July, and the Report of the Select Committee as accepted by the House of Lords on the 27th July 1877, with reference chiefly to the Earldom of Mar. But they have a much broader scope, as determining the attitude in which the House of Lords stands, according to its own definition, with regard to claims to Scottish dignities as involved in the right to vote at Holyrood. It is most important to take account of the attitude thus deliberately assumed on this, the first occasion when the House has seriously reviewed its position,—with an earnest desire, I feel certain, to claim no more than its rights; but as yet, I think, unaware of the limits within which those rights are constitutionally restricted. From a proximate point of view, it will be found in the result that the propositions laid down by the House in 1877 have an unexpected bearing on the validity of the Resolution of 1875 in favour of Lord Kellie, and that in fact they not only cut away the grounds of that Resolution, but clench my argument in support of Lord Mar's actual possession of the ancient and only Earldom of Mar.

## SECTION I.

*Questions of principle evolved.*

As I have already observed, very searching questions of general principle were suggested by the petition of Lord Kellie, the Duke of Buccleuch's Resolution, and Lord Redesdale's appeal to the House against my Memorandum published in the *Times*, which impugned, as he considered it, the absolute juris-

diction of the House of Lords in dignities. The more prominent of these questions, I may now state, were these :—

1. Are the opinions of noble and learned, or noble Lords, expressed in their speeches upon claims to peerages in Committees for Privileges on reference from the Crown, susceptible of being imported into the Resolutions of the Committee reported to the House, and by the House to the Sovereign—so as to broaden the significance of those Resolutions. In a word, are those speeches “judgments” in such wise as the Resolutions have been called “judgments”?
2. Are the Resolutions of Committees for Privileges, reported to and adopted by the House, final and irreversible, whether or not they be in conformity with law, or, in Lord Redesdale’s words, right or wrong? Is there no appeal? And are they to be interpreted benignly, with the view of not inferring privation or injury beyond their strict terms, or the reverse?
3. A Resolution having been reported and accepted by the House, and ordered to be laid before the Sovereign, is the House at liberty to act on it at once without waiting for the approval of the Sovereign, irrespectively of that approval, and in exclusion of any right on his part to reconsider the decision, whether by the aid of a reference back to the House or seeking counsel elsewhere, and this either as the result of his own judgment, or on remonstrance either by the unsuccessful claimant to the dignity, or of parties interested against the claim?
4. Is the House of Lords a Court of Law, possessing exclusive jurisdiction in claims to dignities, or a mere commission of inquiry, to which or to any other advisers, the consideration of claims to dignities may be referred by the Sovereign, but with reservation of final determination to the Sovereign’s own award?
5. Can a claim to a peerage come before the House of Lords except by reference from the Sovereign; and is the House entitled to pass sentence upon rights to peerage apart from such reference?
6. In a word, is the ultimate jurisdiction in peerages in the Sovereign or the House of Lords?

7. On the assumption of the House possessing the right of jurisdiction as a court of law, has the House a legislative power in connection with claims to peerages as involved in the right of voting at elections of Representative Peers at Holyrood? Power, in a word, such as would enable the House to supersede the laws of Scotland by private rules of their own, or to direct an alteration in the precedence of peers on the Union Roll, or otherwise interfere in regard to the elections at Holyrood?

It was not to be expected that Lord Selborne and Lord Chancellor Cairns, who took the lead in addressing the House on the legal and constitutional questions involved in a consideration of Lord Kellie's petition, would give categorical answers on the points above enumerated. They confined themselves naturally to the issue immediately before them, but in so doing they laid down propositions which are uncompromising upon the leading points in question, and clearly although indirectly indicate the responses to the others. The noble and learned Lords were unanimous throughout, except in one point, viz. the question whether the opinions expressed by noble or noble and learned Lords in the speeches addressed to Committees for Privileges form a part of the Resolution, Lord Selborne inclining to consider that they do so, Lord Cairns taking the opposite view; but the Report of the Select Committee, of which Lord Selborne was a member, practically determined the point against the importation of the speeches into the Resolution.

The fundamental propositions laid down by the House of Lords, and which we have now to consider, may be summarised as follows:—

- i. The House of Lords possesses absolute jurisdiction in Scottish dignities, irrespectively of the Sovereign; and their decision expressed in the Resolution of a Committee for Privileges, approved by the House, is a judgment final and irreversible, without appeal, and not to be questioned, whether right or wrong. But the opinions expressed in the speeches of noble and learned Lords who address the Committee for Privileges do not form part of the Resolutions arrived at by Committees, and those opinions cannot be imported into the Reso-

lutions, even although they express the *rationes* upon which the Resolutions are grounded. It follows from this position that the House of Lords were fully justified in passing the Order of the 26th February 1875 before, and irrespectively of, the receipt of Her Majesty's pleasure in regard to the Resolution on the subject of Lord Kellie's claim, approved by the House at the same day, hour, and moment, when they ordered the Resolution in question to be laid before the Sovereign—according to all former understanding, for her consideration, and approval or disapproval.

- ii. As legislation is the joint work of the Sovereign and the two Houses of Parliament, neither possessing independent legislative power, the House of Lords can only act, in regard to the right to vote at an election of Scottish Representative Peers at Holyrood, under power conferred on it by the Legislature, and specially by the Acts of 1847 and 1851. Any action in relation thereto as to the Union Roll, which is not warranted by the special terms of the Acts in question, would be *ultra vires*. It follows that the House possesses no legislative power, cannot supersede the law and custom of Scotland regarding the devolution of or succession to Scottish dignities, and the right to vote dependent on that succession, by private rules of its own device; nor can it reverse a final judgment of the Court of Session affecting dignities. What it has affirmed to-day it may unsay to-morrow, as Lord Chelmsford, for example, did when he acquiesced as a member of the Select Committee in a Report which practically nullified and disavowed his own luminous exposition of the law on the question of jurisdiction in his speech on the Wiltes claim. On the other hand, it is more difficult in the present day than formerly to adopt a retrograde step in departure from truth and right in the presence of the public; and I cheerfully acknowledge that in some and very important points the House has made an advance on the path which, persevered in, will ultimately lead them

back into the broad road of legality, which I hold that they have wandered from since 1762.

The answers informally but substantially given by the House to the questions I have above indicated may be stated as follows, with the corollaries which detach themselves from the solutions of the various problems, and the practical results which these solutions and corollaries indicate:—

1. In the first place, and this is a very favourable item, opinions expressed by those who address a Committee for Privileges do not form part of the Resolution upon a claim to peerage; and, as a necessary corollary, cannot be termed “judgments.” The observation may be interposed that if the speeches (for example) of Lord Hardwicke and Lord Mansfield on the Cassillis claim were considered as “judgments,” and imported into the Resolution, that of Lord Marchmont, which vindicated the law of Scotland as against the novel principle upon which his two colleagues advised the Committee, was equally a “judgment,” and must be equally part of the Resolution, which the phraseology of the Resolution itself distinctly proves it was not—thus reducing the proposition to an absurdity. And, till comparatively recently, the Resolution was arrived at by the votes of all the members of the Committee, lay as well as legal, expressing their independent opinions, presumed to be formed upon the evidence; and it is only, so far as I see, on the fact that the majority in the Committee on the Cassillis claim voted for the heir-male on reasons opposed to those urged by Lord Hardwicke and Lord Mansfield, that the Resolution can be justified as in conformity with the law of Scotland. The *salvo* in the Duke of Buccleuch’s Resolution would have been inadmissible, had the speeches in the Mar claim—which absolutely affirmed the extinction of the original Earldom of Mar and made that extinction the groundwork of the theory of a new creation in 1565, otherwise admittedly without a vestige of proof—been part of the so-called “judgment;” and Lord Selborne’s opposition to the Duke of Buccleuch’s Resolution was grounded on that view. But Lord Cairns thought differently; and the Report of the Select Committee confirmed his view, and determined the present question in the sense which the older and conservative school of lawyers have always vindicated. It follows from this tardy but satisfactory

acknowledgment that when Lord St. Leonards, in the Montrose case in 1853, pressed the speech of Lord Loughborough on the Glencairn claim in 1797 as a final judgment determining the efficacy of the Act Rescissory of 1488 as annulling the Glencairn Earldom, and thus decisive against my father's claim to the Dukedom of 1488, grounded upon the non-efficacy of that Act as affirmed by the Court of Session in the final judgment upon the Glencairn and Eglinton precedency in 1648, Lord St. Leonards had no authority for importing Lord Loughborough's speech into the Resolution of 1797, or representing it as a judgment and binding on the House in 1853, any more than he had authority for supporting Lord Loughborough's right to overrule the final judgment of the Court of Session in 1648, and decide in contradiction thereto.

2. On the other hand, the decision upon a peerage claim, as expressed in the Resolution reported to and affirmed by the House of Lords (the ultimate decision of the Sovereign being left unnoticed), is now affirmed to be a "judgment," final and irreversible, right or wrong; and its sufficiency and force are not to be questioned, and must be the basis of all discussion. Lord Redesdale's proposition was fully accepted and enforced by Lord Selborne and Lord Chelmsford, and taken for granted by the Select Committee. It follows that even although such decision or judgment may be shown to be against law and precedent, its finality is not impeachable, and there is no appeal from its binding force. This was, in fact, what Lord St. Leonards affirmed of the Glencairn decision of 1797. On the other hand, as in the Mar case, these opinions must not be interpreted rigidly so as to infer injury beyond their strict limits. Against the above I would suggest, that although decisions must be considered final when issued by a Court of last resort, and when the decisions are in accordance with established law and precedent, or upon points undetermined by law and dubious up to the moment of decision, yet if decisions are flagrantly against law and precedent, such decisions cannot be final, for a wrong is thereby inflicted, and where there is a wrong there must be a remedy; and the usual course provided is through appeal to a higher court, on writ of error. But there can be no writ of error till the House of Lords has been recognised by law as a court of justice in peerage claims,

which is not the case, and cannot be the case on special grounds in regard to Scottish dignities through the provisions of the Treaty of Union; and the views now affirmed by the House exclude any appeal to the Sovereign, pronouncing the decisions by the House final. Scottish peerage claims are thus preferred before a court of first and last instance, without appeal from their arbitrary decision, a thing abhorrent to British justice—if the views of the House of Lords be accepted as sound on this point.

3. The Resolution having been reported to the House and affirmed by the House, the House is at liberty to act upon it “at once” on behalf of the claimant in whose favour it was passed, and even although another party, to whom the House attached the character of a counter-claimant, and who has opposed the claim as an aggression upon his own pre-existing and actual right, be affected by the decision. By “at once” is understood the actual moment when the Resolution is approved by the House and ordered to be laid before the Sovereign—the Order of the 26th February 1875, the legality of which was sustained by the House, having been issued in the same breath with another Order that the Resolution should be reported to the Sovereign, and with the confirmation of the Resolution by the House—even before the Sovereign received the Report of the House. The Report to the Queen was thus reduced to a mere formality: the House inform her of what they have decided—there is no necessity to await her intervention by approval or disapproval; all power of hesitation, inquiry, or overruling on her part is precluded; all right of petition to the Sovereign by the party unsuccessful in opposition is excluded. I had ventured to suggest that the Order to the Lord Clerk Register, issued in manifest contempt and overruling of the Royal jurisdiction, and in practical extinguishment of any right or power of remonstrance on the part of Lord Mar or others, was *extra vires* of the House—and I think so still, although the House has repudiated the suggestion.

4. The House of Lords being thus possessed of jurisdiction in dignities, pronouncing judgments in the shape of Resolutions, which are final and irreversible whether right or wrong, is practically at least a court of law, and in no sense a court of mere inquiry, advising a judicial power in the background, vested

in the Sovereign; while, if thus invested with power, and its decisions without appeal, claims to dignities must necessarily be considered as addressed to and determined by itself, although through the formal medium of the Sovereign; and the Sovereign has no power either to refer a Resolution back to the House for reconsideration, or to refer a petition to any other consultative body, either before or after consulting the House, except the House of Lords. It amounts to this, that, whereas the Sovereign, the fountain of justice as well as of honour, had in England reserved the jurisdiction in dignities as a privileged subject to his own particular arbitrament, when delegating the jurisdiction in lesser civil rights to inferior courts, this distinction has now ceased, and the House of Lords has invested itself (for it has no statutory authority) with this jurisdiction. But, however this may be acquiesced in by the Peers of England, it cannot affect those of Scotland, who have never been under any obligation to resort to the Sovereign for awards on their claims to dignities, but have done so voluntarily and under an implied compact, the terms of which as well as the jurisdiction cannot be taken over by the House of Lords, so far as they are concerned, without their consent.

5. If the Report to the Crown, after a decision is given, be a mere formality, and the House is entitled to act before the judgment of the Sovereign is given, the words of reference "His Majesty being moved on this Petition is graciously pleased to refer the same to the Right Honourable the House of Peers, to examine the allegations thereof as to what relates to the Petitioner's title therein mentioned, and to inform His Majesty how the same shall appear to their Lordships," are nothing but a mockery.

6. The ultimate jurisdiction is thus in the House of Lords, not the Sovereign; and Lord Chelmsford was in error in affirming the contrary in the Wiltes case.

7. The last preceding articles have all been eminently unfavourable, to the effect of stripping the Crown of its privilege of jurisdiction, so far as such mere assumption of judicial power by the House of Lords can have that effect; but, on the other hand, as a *per contra*, it is now admitted and enforced that the House has no legislative power in connection with the determination of claims to dignities, or with the right of voting at

the elections of Scottish Representative Peers at Holyrood, or with the precedence of peers upon the Union Roll, which Roll they have no power to alter, their only power of interference being what is given them by Act of Parliament. The Report of the Select Committee expresses itself somewhat dubiously on the latter point.<sup>1</sup> But they have at least repudiated any power of interference with the Union Roll, both in general terms and in the particular case of Mar. In this absence of legislative authority, the House can only act in the case specified under power specially and guardedly committed to them by the authority of Parliament, the Acts of 1847 and 1851 being, in fact, the only statutory authority for their interference—the Act of Parliament of 1707 giving them, as I have shown, none whatever. The corollaries that flow from this fact, that the House possesses no legislative power, are two; which will be found to be very fruitful in results:—

- i. All General Resolutions passed by the House of Lords from time to time affecting dignities in a legislative manner—of which Lord Rosebery's Resolution of 1822, repeatedly alluded to in the preceding pages, is a notable example—have been *ultra vires* of the House, and thus illegal; and, if any still subsist, they are null and void, and should be rescinded without loss of time, as Lord Rosebery's Resolution was rescinded at the instance of the Duke of Buccleuch in 1862. The series of these General Resolutions dates from before the Union; and it has always been held that they were passed by a mere usurpation of legislative power; but the usurpation is now practically acknowledged and repudiated. It follows that all applications of such General Resolutions in special cases have been equally *ultra vires* and illegal. When such General Resolutions have been in actual supersession of existing law, they are of course condemned *a fortiori*.

<sup>1</sup> In the words, "The Committee have not been able to discover any precedents of Orders made by the House for altering the order of precedence of the Peers of Scotland on the Union Roll. There are, as already stated, precedents of the insertion of names omitted from the Roll, but there are no precedents of Orders made for changing the order of names already on the Roll. The Committee do not hereon desire to express an opinion that in a proper case the House would not have the power to make an Order to this effect."

ii. General Rules, in like manner, laid down and enforced by the House of Lords on their sole responsibility for their guidance in the determination of peerage claims, have no legislative sanction, and *a fortiori* are *ultra vires*, illegal, null and void, with all that has followed or may follow upon them, when they are in direct opposition to the law of the land. Of this nature are—

a. The private rule of the House by which the presumption is affirmed to be in favour of the heir-male as against the heir-general in the case of Scottish Peerages, where the charter or patent of creation is lost, and no collateral evidence exists as to the destination, an exception being allowed upon proof to that effect in favour of the heir-general, the *onus probandi* resting on the latter,—this being in absolute contradiction to the Scottish law and presumption on the subject. The establishment and enforcement of this rule has been *ultra vires* from the first; and when it has been enforced to the injury of the heir-general and the undue recognition of the heir-male, as in the case of Lord Kellie with respect to the alleged earldom of 1565, it is difficult to see how the decision of 1875 can be vindicated and supported even by the House itself, after its acknowledgment that it does not possess the legislative power which could alone enable it to originate and enforce the rule of succession in question. The affirmation of such a claim as final and irrevocable, right or wrong, is a pure assertion of the autocratic power of a leviathan. Fortunately, as already observed, most of the decisions in which this private rule has been resorted to have been in favour of the right parties, in consequence of their being able to prove an exception to the rule by Scottish law. It is well to observe that whenever Lord Hardwicke and Lord Mansfield, and others following their example, have introduced words into their Resolutions in order to mark and enforce the rule in question, or any other rule of a similar

character, such words are mere interpolations upon the ancient formula by which the House of Lords signify in general terms their opinion on the merits of a claim referred to them, and consequently form no part of the formula, nor, properly speaking, of the Resolution, and the House of Lords is thus freed so far from the responsibility.

- b. Of the same nature as the preceding rule, the assumption of the House of Lords that they have power to review the final judgments of the Court of Session, and determine differently—those judgments being final and binding upon all subsequent tribunals—can only be vindicated on the ground of a legislative authority in the House, enabling it so to act, so to overrule, and so determine, through self-creation as a court of review, setting aside the provisions of the Treaty of Union. The disavowal of legislative power cuts the ground from under the feet of the assumption in question : and the overruling of the *Mar v. Elphinstone* Decree of 1626 in the recent *Mar* case, that of the *Glencairn v. Eglinton* Decree of 1648 in the *Montrose* case in 1853, and that of the *Oliphant v. Oliphant* Decree of 1633 from 1762 to the present time, are all thus stamped by the House with illegality ; as has been over and over again insisted upon by authorities outside the House, as I have shown at large in my report on the *Montrose* claim.
- c. Lastly, and omitting some other similar rules, the private rule, initiated by Lord Camden, and introduced in the Resolutions of the House upon the *Sutherland* case in 1771, although for the information of the House only, not the Sovereign, to the effect that no charter of a comitatus which does not specially convey the dignity shall be considered otherwise than a mere grant of lands, was an act of quasi-legislation, in subversion alike of law and custom in feudal times in Scotland, and

cannot stand for a moment, now that the House has abjured all legislative power of intervention. As matter of fact, charters of a comitatus of the description specified conveyed the dignity although not specified. The refusal of the Committee for Privileges in 1875, in obedience to Lord Camden's rule, to recognise the charter of the comitatus of Mar of 1565 as conveying the dignity of Mar along with the fief under the limitation "*hæredibus*," including heirs-general, was thus as much *ultra vires* of the House as the recognition of the supposed Earldom of Mar in Lord Kellie, in obedience to Lord Mansfield's rule in exclusive favour of heirs-male.

Every point in which the traditional law and practice of the House of Lords overrules Scottish law is, in a word, an assumption of legislative power on the part of the House, which is now condemned by the House itself as an usurpation. Where no legislative power exists, it is incompetent for either of the two Houses of Parliament to lay down rules affecting rights of succession or any other ascertained rights, at variance with the law and custom of the land—as in the case which has been especially before us in these Letters.

The result of the preceding review is that much that was previously nebulous and fluctuating in the traditional doctrine of the House of Lords has been authoritatively fixed, in some points favourably, in others unfavourably, to the views of those who hold by the law of Scotland as the ultimate criterion, and who appeal to it, as I have done in the Protests which form the subject of Lord Kellie's criticisms, to justify their refusal to acquiesce in decisions which they consider to be untenable when tested by that criterion.

The House has thus taken a new departure in its acceptance of the *dicta* of Lord Selborne and Lord Cairns, and of the Report of the Select Committee, grounded on those *dicta* and drawn up by Lord Cairns; and its views of the past must necessarily and in consistency be modified to the extent to which its former conceptions have now been corrected; while

it is bound from this time forward to apply those corrections to its practice in cases that may come before it. For remedy where injury has been done in times past, resort (the House being *functus* after report to the Sovereign) must be had to a competent tribunal. At the same time, it is to be remembered that the opinions delivered by Lords Selborne and Cairns, and accepted by the Select Committee and the House, and upon which a line of action has been suggested for Lord Mar to follow, have no statutory or controlling power beyond that of moral obligation,—what the House has affirmed to-day it may unsay to-morrow, as shown not many years ago in the Wiltes as compared with the Devon claim. This is a contingency to which it would be folly to shut our eyes ; but we may reasonably hope rather than fear. It must be admitted that in some and very important points the House has made an advance on the path which, persevered in, will ultimately lead it back into the broad road of legality, which it has wandered from since 1762. Were prejudice dispelled—or call it preoccupation—everything might be expected from its native candour, honesty, and wisdom.

The results thus far which affect Lord Mar, as flowing from the preceding propositions affirmed directly or indirectly by the House of Lords, are briefly these:—He stands *primâ facie* in a much better position since the debate of the 9th July, and the Report of the Select Committee, 27th July 1877, than he did before, that is, subsequently to the Resolution of the 25th, and the promulgation of the Order of the 26th February 1875. Whereas at that time it was considered that the unpromising assertions of Lord Chelmsford, Lord Redesdale, and Lord Cairns in their speeches, to the effect that the original Earldom of Mar was extinct, constituted a judgment, upon which the Order of the 26th February 1875 might justifiably be issued, it has now been admitted by the House of Lords that it is an open question whether that ancient earldom is or is not extinct, and that a claim is competent on the part of the heir-general, the existence of the comparatively modern earldom of 1565 being no bar *per se* to the continued existence of the ancient dignity. I notice also a gradual cessation of the qualification of “claimant” so long attributed to the heir-general, alike in the House of Lords and out of it, and notably

at Holyrood. The Order of the 26th February 1875 is justified, upheld, and enforced by the House on the ground, necessarily, of its exclusive jurisdiction in Scottish dignities—I say necessarily, because that is the only ground it has to show upon which it can be vindicated against the charge of being *ultra vires*, as issued apart from, and before, any approval by the Queen of the Resolution adopted by the House on the 26th February, in the same breath with the fulmination of the Order in question.

But beyond these superficial considerations, I must signalise the following, which go to the root of the matter:—

It is admitted that the House has no legislative power,—it cannot therefore pass General Resolutions, nor enact private rules subversive of Scottish law. The General Resolution styled Lord Camden's law belongs to the first of these categories; the rule of succession in favour of heirs-male, often styled Lord Mansfield's law, belongs to the second. Both these rules are private laws, enunciated for the guidance of the House of Lords by Lords Hardwicke, Mansfield, and Camden, are in contradiction to the Scottish law of succession, and set it aside, and are thus *ultra vires* of the House. It follows, therefore, first, that the application of Lord Camden's rule to the interpretation of Queen Mary's charter of the 23d June 1565 was without warrant, and that that charter must be understood to carry the dignity along with the fief or territorial Comitatus of Mar; and, secondly, that the application of Lord Mansfield's rule, reversing the Scottish rule and presumption of succession in favour of heirs-general, was without warrant, and that Lord Mar succeeded as a matter of course *de jure* and *de facto* to his uncle, the late Earl, as next of kin, in 1866, the original destination "hæredibus," or to heirs-general, in the charter of 1565 not having been altered in favour of heirs-male by any subsequent grant, and the heir-male, Lord Kellie, consequently having no pretensions to it, as in fact he makes no pretension. It follows equally that on the hypothesis of a new creation in 1565, the heir-general and no other inherits under it; and there is no place for Lord Kellie as Earl of Mar under either creation,—precisely as the officers of the Crown advised the House of Lords in their address on the 4th May 1874. The abnegation by the House of legislative power, except in

so far as delegated to it by Statute, thus cuts away the ground from under the feet of the Resolution in favour of Lord Kellie, 25th February 1875. This is *per se* enough to vindicate his right in the eyes of the House of Lords itself, as now opened to the limits of its powers of action by the Report of the Select Committee, and this independently of the acknowledgment equally involved in the abnegation in question, viz., that the House has no power to supersede the final judgment of the Court of Session in 1626, which, as I insisted in my first Protest, determined once and for ever the validity and invalidity of the documents used and founded upon the legality and illegality urged respectively by Lord Mar and Lord Kellie in 1875. The broad sanctions of the Treaty of Union, protective of the laws of Scotland and the privileges and judgments of the Court of Session, cover the whole of this remonstrance with their protective wing.

## SECTION II.

### *Act of 1847 defective in point of authority.*

It remains for me to subject the Act of 1847 to that deeper and more searching criticism which is required at my hands. This criticism will remove, I think, all risk of its being further thought of in connection with Lord Mar; and it will furnish matter for consideration for the Peers of Scotland as a body, which I shall touch upon in my concluding Letter.

While the Act of 1847 is, I have shown, as inapplicable *ex terminis* to the case of Lord Mar, there is a further and fatal flaw attached to it, which I must here expose—although with enhanced consciousness of the responsibility attaching to one who questions the legality of an Act of Parliament. But it is an Act passed by English lawyers upon a matter governed exclusively by Scottish law, and I cannot shut my eyes to the defect attaching to it. My proposition is that the Act cannot be applied to the case, not only of Lord Mar, but of the very pretenders against whom it was, as I have shown, directed, inasmuch as it is defective in point of authority, and proceeds *a non habente potestatem*.

1. By the custom of England, the sole and ultimate jurisdiction in claims to dignities is vested in the Sovereign,

to whom claims must be preferred by petition, *i.e.* petition of right. The House of Lords, or any other consultative body, to which the Sovereign may apply for advice as to the merits of the claim, advises the Sovereign, but does not judge. The words "resolved and adjudged" prefixed to Resolutions express nothing but the opinion of the House or other consultative body as to the merits, and such words as "adjudication," "decision," "judgment," express—as actually admitted by the House in 1877—no higher sanction. But I need not recapitulate what was so clearly laid down, in sequence to older authority, by Lord Chelmsford himself in his speech on the Wiltes case, already cited. No privilege or prerogative of the Crown can be taken away except by express words in an Act of Parliament; such privilege or prerogative cannot be affected by words of implication, or in any indirect manner; and yet this transcendent privilege of the Sovereign is actually ignored by the Act of 1847 as if it had never existed,—the Act proceeding on the tacit assumption on the part of the House of Lords that it is possessed of absolute jurisdiction—the right of the Crown being recognised as a matter of form, but practically disregarded. It is this bare assumption which, as I have shown, underlies the whole debate of the 9th July 1877—the authority of the Queen, set absolutely at nought as it was by the Order of the 26th February 1875, being utterly overlooked, except by Lord Mansfield, from first to last. The Act of 1847 slipped through Parliament and received the sanction of the Sovereign under this culpable oversight; but neither Parliament nor Sovereign, nor both together, can alienate a jewel of the prerogative, or an acknowledged privilege of the Crown, by a side-wind, or without express specification of the privilege which is to be taken away; and thus the Act of 1847, defective in its most essential point, is an absolutely dead letter in law, so far as the transfer of the exclusive right to determine upon dignities according to the custom of England is concerned. But the Act proceeds further upon the fallacy of supposing that Scottish claimants

and Scottish peers are under any obligation to submit themselves to the jurisdiction of the Sovereign according to the English custom. Without going further into this question, it has to be noted that in all cases where the claimant of a Scottish peerage has submitted his pretensions to the arbitration of the Crown, it has been under an implied and necessary although tacit compact that his claim shall be adjudicated upon by Scottish, not foreign law; and if in any case this compact has been broken, the claimant or the peer whose interest is at stake, re-enters necessarily into his rights, and may renew his claim if he so think fit in another quarter. This is laid down in fact as English law by Lord Chief-Justice Holt in the Banbury case, in the words elsewhere quoted.<sup>1</sup> But in cases where no petition has been addressed to the Sovereign, as for example in Lord Mar's case, the English custom is utterly inapplicable; and yet the Act of 1847 proceeds upon the assumption that not even the Sovereign, but the House of Lords, is the sole tribunal and seat of justice in regard to Scottish dignities. The Act of 1847 gives away, in a word, what is not its own to dispose of.

2. Again, by the law of Scotland, which is preponderant in all cases of Scottish dignities, the jurisdiction in all civil actions, including dignities, is vested exclusively in the Court of Session, without appeal to King or Parliament; and this jurisdiction, and the relative right of the subject to prosecute a claim or defend a right by declarator or defence before the Court, is reserved and protected by the Nineteenth Article of the Treaty and Act of Union, as has been already shown. No infringement of the authority or independence of the Court of Session, no supersession of its functions, can be constitutionally effected, even in the slightest particular, except by express enactment by the Parliament of Great Britain, and then only "for the manifest benefit of the people of Scotland." Claimants of Scottish peerages and peers in actual possession of Scottish

<sup>1</sup> See Letter II. vol. i. p. 96.

peerages have gradually, since the decision of the Lovat claim by the Court of Session in 1730, come to adopt the practice of submitting their pretensions to the judgment of the Sovereign under the compact and condition above stated, although it is unquestionable that by Scottish law, as matter of constitutional obligation affirmed at the Revolution of 1688, the Sovereign cannot resume and exercise any jurisdiction which the Crown has once delegated to a court of law, as was the case in regard to dignities, as well as all other civil rights, when the jurisdiction was conferred by Statute on the Court of Session,—the exercise of jurisdiction by the Sovereign in Scottish peerages, according to the English custom, being thus absolutely a matter of mere arrangement between the Sovereign and the claimant, and practical acceptance on the part of the House of Lords and the Scottish peerage, but in no-wise binding upon any who do not thus submit themselves; while the jurisdiction, being purely permissive on the part of claimants, cannot be dealt with or usurped from the Crown and attributed to the House of Lords under the idea that the Crown has any legal right to it. On the other hand, the authority of the Court of Session to adjudge and determine finally in such cases cannot be in any way affected by the disuse of application for its exercise, and most unquestionably cannot be taken away without special and distinct enactment; whereas not only are that authority and the rights of Scottish subjects (claimants and peers), under the Treaty of Union not specified, and not expressly rescinded by the Act of 1847, and according to the restrictive provision in the Treaty of Union, for the manifest benefit of the people of Scotland; but it is clear as the sun at noonday that the framers of that Act, and the Parliament that passed it, were in blank ignorance of the jurisdiction of the Court of Session, and of the great privileges and interests they were meddling with; and were, as in the case of the privileges of the Crown in the English sense, giving away what was not their own, nor within their power to dispose of. It does not in fact give, strictly

speaking ; it assumes that the House of Lords possesses the jurisdiction, and then provides means for the exercise of the jurisdiction in the particular cases it deals with.

3. Such then being the conditions affecting the Scottish and English law and practice in cases of honours, the Act of 1847 falls short of the requisites of validity in the following points :—It ignores, in the first instance, both the judicial functions of the Sovereign, in so far as such may be considered to obtain in cases of petition to the Crown by Scottish claimants ; and, in the second, the statutory jurisdiction of the Court of Session in dignities, exercised without a break from the constitution of the Court in 1532, till 1707, the year of the Union ; and in the Lovat case and others subsequently to the Union, untouched and uncurtailed by any legislation down to the present time ; and then, without special recitation and abrogation of the privileges of the Crown, or any special recitation and abrogation of the judicial authority of the Court of Session, provides a machinery for the trial of the right to Scottish peerages before the House of Lords, on the bare assumption that the House possesses jurisdiction in such matters, not by conferring it,—the House possessing, in fact, none. Neither the privilege of the Crown, nor the powers of the Court of Session, nor the right of the subject to resort to the Court, can be affected indirectly or by implication ; and the Act of 1847 being utterly wanting in the clauses and enactments requisite in order to give effect to the intention of the Legislature, is thus, as I have asserted, a *caput mortuum*, incapable of being applied either to the case of the Earl of Mar or that of any other peer, or even to the case of pretenders such as the Act is exclusively directed against, as by the terms of its preamble and the evidence of the Report of the Select Committee out of which it sprang.
4. The only plea that I can think of as likely to be urged in support of the Act of 1847 is, that it is an Act of Parliament, and, being such, must—like the Mar decision of 1875—be obeyed, right or wrong. The Act

of 1847, striking as it does at pre-existing constitutional rights, can only be vindicated by the assertion of the "omnipotence" of Parliament. I have not forgotten Lord Chancellor Cranworth's words in his speech on the Montrose claim in 1853, referring to an argument he attributed to the officers of the Crown (acting on behalf of the Duke of Montrose in opposition to my father), but which he adopted as his own,—“although by no ordinary course can a peerage end except by attainder or some other mode in Scotland” (*i.e.* by resignation), “yet there must be one exception to the rule so defining the mode in which a peerage may become alienated; for it may be put an end to by what we sometimes call the omnipotence of Parliament. Parliament can destroy a peerage, or take a person's property, or do anything else”—although not, as I maintained in my published Report of the claim, without just cause, not in violation of existing law, not through its own inherent and independent despotism overruling existing law. But, whatever might be the omnipotence of the Scottish Parliament in the fifteenth century, the period to which Lord Cranworth referred, or whatever may have been the omnipotence of the English Parliament up to the date of the Union in 1707, I have to remark (as I did in 1852) that the “Parliament of Great Britain” is in no sense omnipotent since the Union. It may be well for the Peers of Scotland to recollect the argument of such of their number as advocated the Treaty of Union in the last Scottish Parliament in 1706, and the discussion upon the Third Article of the Treaty. It was urged by the opponents of the Treaty, “that, whatever agreement is now concluded between the two kingdoms will never be binding to the new Parliament,” *i.e.* that of Great Britain,—“that the two kingdoms effectually subject themselves to the new Parliament, all the conditions stipulated on either side to the contrary in any wise notwithstanding.” The answer of the Peers who supported the measure was, as reported by Defoe, this: “That the British Parliament were absolutely bound up

by the stipulations of this Treaty; that they, being a subsequent power to the two respective Parliaments of either kingdom, had no other or further power to act than was limited them by the stipulations of both kingdoms: That all subsequent power is inferior in its extent to the power which it derives from: That the Parliament of Great Britain, being the creature of the Union, formed by express stipulations between the two separate Parliaments of England and Scotland, cannot but be unalterably bound by the conditions so stipulated, and upon which it received its being, name, and authority. The foundation of a British Parliament is this Treaty—to say they will not be bound by it is to say they will pull themselves up by the roots; they die when the Union receives any mortal wound; they cannot infringe one article of the Union; they cannot put a question in the House upon any one article.”<sup>1</sup> It was upon this understanding that our ancestors, the Peers of Scotland, consented, as one of the Three Estates of Parliament, to the great and beneficial Treaty and Act which can never become obsolete so long as the cohesion of the two nations continues; and I say, therefore, that the argument that the Act of 1847 must be binding, and the authority it purports to confer upon the House of Lords in respect of the claims arising out of contested votes at Holyrood, and in recognition of a power of jurisdiction in the House which they do not possess by law or treaty, cannot be vindicated on the ground that the Act is an Act of Parliament, and, being such, must be obeyed in virtue of the omnipotence of Parliament—an impious word at best, but which since the Union has ceased to be in the slightest degree applicable as against the laws of Scotland, and the rights of the people of Scotland under those laws, as protected by the Treaty of Union.

One further question arises upon the criticism of the Act of 1847, and which has its marked bearing upon the general question involved in the present observations.

It may have been remarked that two Acts of Parliament—

<sup>1</sup> Defoe's History of the Union, p. 357.

one of the Parliament of Scotland before the Treaty of Union, 2d February 1707, but which is declared to be of the same force as if it was engrossed in the Treaty, and the other of the first Parliament of Great Britain after the Act of Union, 6 Anne, cap. 23—are referred to in the preamble of the Act of 1847, and in the recent Report of the Select Committee of 1877 in echo of that Act, as if the two Acts in question furnished a basis, and standing authority, and warrant for subsequent interference by Parliament in respect of the elections of Scottish Representative Peers. But a reference to the Acts themselves—neither of which are printed in the Appendix to the Report—will show that they have no such import. I am sorry to delay the reader upon what may appear to be minute criticism, but such is never deprecated by those who are anxious to pierce to the foundations of truth.

When the first, or Scottish, Act was passed, the Privy Council for Scotland was still in existence, and the writ for the purpose of summoning the Peers for election of their Representatives was ordered to be addressed to that Council. But the Privy Council was abolished, or rather absorbed into the Privy Council of the United Kingdom of Great Britain, immediately after the Union; and the course adopted was to issue a Royal Proclamation summoning the Peers directly to the fulfilment of their duty. The abolition of the Privy Council, which was in contemplation when the Scottish Act was passed, was effected by the Statute 6 Anne, cap. 6; the Scottish Act being the first, and the Act 6 Anne, cap. 23, the third in historical and relative sequence, being the second enumerated in the Act of 1847, the intermediate Act containing the constitutional change which connects the first and the third being omitted. The words "further provision," on which stress is laid in the preamble of the Act of 1847, have exclusive reference to the modification in the form of the writ of summons to the peers, thus elucidated. The Act 6 Anne, cap. 23, contains many provisions respecting the oaths to be taken, declarations signed, and other formalities connected with the elections; but neither the Scottish nor the English Act confers the authority for future interference, regulation, and legislation, which the Act of 1847 assumes to be its own warrant. On the contrary, when the Houses of Parliament had

passed the Act 6 Anne, cap. 23, to the effect stated, their commission under the authority of the Treaty of Union and the Act of the Scottish Parliament 7th February 1707, was exhausted, and Parliament became *functus* thenceforward.

If anything is clear from both Acts—and the second recites and confirms the former, except in the particular change necessitated by the abolition of the Privy Council—it is this:—1. That the election of the sixteen Representative Peers is to be by their brother peers by open election, in absolute independence of any extraneous authority; 2. That the office of the Lord Clerk Register, or of the Clerks of Session in his absence, is simply to attend, ask for, and register the votes, and report the result to the proper quarter; and, 3. That no power is given to Parliament, and *a fortiori* to the House of Lords, to interfere in elections, or to prescribe and regulate the manner in which they shall be held, or take any cognisance of rights to vote, or make use of the Lord Clerk Register as an instrument for controlling the free action of the assembled Peers. Any such interference, therefore, is an infraction of an Act which is itself declared to be as valid as if “engrossed” in the Treaty of Union.

On this ground, therefore, *per se*, the Act of 1847 proceeds without sufficient authority. It may be really allowed that abuses had sprung up through the tendering of votes by mere pretenders during many years previously to 1847, but when the Select Committee in 1847 observed in their Report that “it is believed that the Peerage of Scotland is the only body invested with important privileges in this kingdom without any provision being made for testing the right of those who may claim to exercise them,” they were in ignorance of the law affecting such questions, and which is standing law at the present moment under the Treaty of Union. The question of the right to vote, as dependent upon legal possession of the dignity upon which the vote is tendered, pertains exclusively by law to the cognisance and determination of the Court of Session now, as before the Union. No doubt could possibly exist on the subject, either in the Parliament of Scotland on the one hand, or in that of Great Britain on the other, at the time of the Treaty of Union, which specially protected the Court and the subject in their existing rights and privileges. I

have already noticed that the Order of the House of Lords 12th February 1708, on receiving what is now called the Union Roll of the Peers of Scotland, and directing it to be entered into the Roll of Peers, added the following *salvo*:—"That whereas there are several Protests entered on the Records of the Parliament of the part of Great Britain called Scotland in relation to the precedency of the Peers, the said Protests shall be and are of the same force with relation to their claim of precedency as if they had been entered in the Roll of Peers, or in the Journal of the House of Lords." This was in full appreciation by the House of the right of the Court of Session to adjudicate in all such claims "as accords of the law," in the usual course of justice. And in the like manner we may be well assured that it never entered into the mind of man to conceive at that time that the question of the right to a dignity arising in the course of an election at Holyrood could be considered or decided upon by other judicial authority than the Supreme Civil Court, which enjoyed absolute cognisance in such cases, and whose jurisdiction had just been affirmed and reserved by the great international Treaty of 1707. In a word, the necessary machinery for preventing recent scandals, in accordance with the law of Scotland, exists unimpaired and available at the present moment.

Everything, in fine, points to the conclusion that the Act of 1847 was passed most hurriedly and inconsiderately through Parliament. The original draft was prepared, as we have seen, by Mr. David Robertson, a most respectable man, but a mere Parliamentary law-agent and conveyancer. No other evidence than his, and that of Mr. Russell, was taken by the Select Committee, while it does not appear that the law officers of the Crown for Scotland were consulted on the occasion, or that any inquiry was made into the law of Scotland with reference to the jurisdiction in dignities and the elections at Holyrood. The examination of the two gentlemen referred to took place on the 7th May; the Report of the Select Committee was ordered to be printed on the 4th June, and the Act, which has been the subject of these observations, was passed on the 25th of that month—rather rapid legislation. It has proved, like previous attempts, but a crude and impotent concoction; and the Act can only be classed among those "various remedies"

attempted by the Resolutions of the House of Lords, although in this case by higher apparent authority, which, by the acknowledgment of the Select Committee of 1847, had proved "insufficient" or "inoperative" towards checking the abuses complained of; and it ought to be erased from the Statute-book. The Act looms like the spectre of Loda in Ossian, a gigantic but unsubstantial form, a standing menace to the Peers of Scotland; its direct effect being to subject them for the first time, their rights to their ancient dignities, and the Peerages of Scotland at present dormant or supposed to be extinct, standing on the Union Roll, to the tender mercies of a court, which would be in the spirit of the Act a court of first and last instance, and irresponsible, from which no appeal is possible—only to be compared to a Star Chamber, but from which the Sovereign is excluded. The Act ignores all existing law and custom, alike of Scotland and of England, and the Treaty of Union, which is the mainstay of Scottish liberty, on the assumption that the right and privileges of the Peers of Scotland, and I may say of the people of Scotland, of which they are an integral part, may be dealt with by the *sic volo sic jubeo* of Parliament. The Act, as it stands, furnishes a foundation and precedent for a similar prostration by Act of Parliament of the peers and peerages of England to the arbitrament of the House of Lords—a body who, it should never be forgotten, have repeatedly, from time to time, attempted to act in such cases irrespectively of the Sovereign. "Proximus ardet Ucalegon." On general principles, therefore, the Act should be protested against as defective in proper sanction, and proceeding *a non habente potestatem*.

Such, then, is the character of the Act 10 and 11 Vict. cap. 21, or of 1847, which the Report of the Select Committee drawn up by Lord Cairns has thus tied like a collar of slavery round the neck of the Peers of Scotland, without the slightest consciousness that this would be the effect of his resort to it.

I shall conclude the present Letter, and indeed the whole series up to the present point, by a few practical observations respecting—1. The position of the Peers and people of Scotland generally, as affected by the Mar decision; and 2. The manner in which claims to Scottish dignities ought, I think, to be prosecuted from this time forward.

1. I may repeat, on the first point, what I said in my first Protest:—"Acceptance of the vote of the Earl of Kellie as Earl of Mar in virtue of the report" (of the 25th February 1875), "grounded as above," *i.e.* on disallowance of the Decreet of the Court of Session in 1626, and on the principle that the House of Lords have power to overrule such decisions, "would . . . amount to a sanction and homologation of the principle indicated; and such sanction and homologation must import very grievous peril to the Peers of Scotland, and to heirs and claimants of Scottish dignities, at a time when the above novel and revolutionary principle, adopted and enforced by Committees for Privileges, threatens, if acquiesced in, to deprive them of all security against their ancestral rights, as dependent on judgments of the Court of Session, being overruled and set aside hereafter, as in the three cases" (of Glencairn, Montrose, and Mar) "above specified, the uncertainty and peril being now such that no man can say where the blow will next fall." I further protested, "because . . . acceptance of the vote of the Earl of Kellie" as Earl of Mar, upon the report of the Committee for Privileges, founded on the principle above shown, "would be incompatible with rightful obedience to the law of the land, and due reverence for constituted authority; and would thus amount not merely to the sanction of private wrong, but to the infliction of public injury, striking at the roots of justice." Whether or not this apprehension is justified I leave to the reader who has perused the preceding pages.

I have said nothing of the leaning in the House of Lords to discourage claims to ancient dignities, initiated by Lord Hardwicke in the Cassillis case, and expressed in the strongest terms by Lord St. Leonards in the Montrose case, when he proposed that a "limitation of time" should be put upon claims to peerages, "in order to prevent such enormous expense, and such consumption of time as must very often take place in regard to claims of ancient peerages"—instancing the Montrose claim as a case in point. I shall probably consider this question in another work, but will not do more than simply notice it here, with the observation that Lord St. Leonards's proposition strikes at the very roots of the Scottish Peerage, many of the dignities held by Scottish families being of date far older than 1488, the period pointed at by the noble and learned Lord;

while most of them are descendible by their constitution to distant collateral heirs. Many a lofty and branching tree, cherished and venerated by the people of Scotland, and by the numerous tribe of "Scoti extra Scotiam," as landmarks of their ancestral and national history, would thus be levelled with the dust.

2. What practically and immediately concerns Scottish Peers, anxious for the due and legal descent of their dignities, and Scottish claimants of such dignities, in the presence of the current system of claiming by petition to the Crown, and receiving what is now assumed to be the final and irreversible sentence, not of the Sovereign, but of the House of Lords—is the question, Would it not be wise for claimants to return to the only constitutional and legal tribunal for the decision of such claims, the Court of Session? It must be remarked, as I have already stated, that it is only by allowance on the part of claimants that they have invited the Sovereign to arbitrate on their pretensions, according to the custom of England, and this on the faith of an implied compact, viz., that the Sovereign shall, under due advice, decide on the principles of the law of Scotland. But in the present instance that compact has been broken by the procedure of the House of Lords in enforcing rules and laws of its own devising since the Cassillis and Sutherland claims, superseding those of Scotland, to say nothing of the overruling of the final decision of the Court of Session, that procedure having been confirmed by the Sovereign. Claimants themselves are, according to Lord Chief Justice Holt, entitled to resort to the courts of law in such cases, if the award of the Sovereign is unjust; but under any circumstances the compact can no longer be considered as existing when the House of Lords has assumed the entire privilege and responsibility of jurisdiction. It was not with the House of Lords but the Sovereign that the original compact was made; and claimants under any circumstances thus re-enter with their original rights of resort to the legal courts of their country. This subject will be resumed in the concluding Letter.

## LETTER XVI.

## LATER INCIDENTS IN THE CONTROVERSY.

THE relative position of the parties in this great struggle—of Lord Mar and the House of Lords—has not been changed by anything which has taken place since the Report of the Select Committee of 1877. Two elections of Scottish Representative Peers have been held at Holyrood, on the 11th March 1879 and on the 13th April 1880, at each of which there was discussion on the subject of Lord Mar's right; and a conversation took place in the House of Lords in the interval between those two elections, on the 11th July 1879, on the occasion of some questions put by the Marquess of Huntly, in answer to which Lord Cairns and Lord Selborne, Lord Selborne more particularly, contributed further elucidation as to their views with respect to the significance of the Order 26th February 1875, and the right of the House of Lords to intervene judicially in Scottish dignities. These views must, of course, be considered—in so far as they may be developed beyond those asserted in 1877—as simply the personal opinions of the noble and learned Lords, without the sanction and stamp which the Report of the Select Committee, and the acceptance of that Report by the House, gave to them as originally promulgated. I shall notice these successive events, but, with the exception of Lord Cairns's and Lord Selborne's speeches, very briefly.

## SECTION I.

*Election of 11th March 1879.*

Notwithstanding the damaging admissions of the House of Lords in 1877, the Order of the 26th February 1875 has been enforced by the Lord Clerk Register at the elections of 1879

and 1880; the vote of Lord Kellie as Earl of Mar, under the alleged creation in 1565, has been received and counted in the place and precedence of the original earldom, to the violation of the rights of precedence of the seven Earls created between 1457 and 1565; and Lord Mar has been compelled to abstain from offering to vote lest the provisions of the Act of 1847 should be brought to bear against him.

I thought it advisable at the election of 1879—partly in consequence of the development of opinion in the House of Lords indicated by the Debate and the Report of the Select Committee in 1877, and partly in order to impress the historical, legal, and constitutional grounds of my remonstrance more deeply on the records of Holyrood—to lodge an Additional Protest against Lord Kellie's vote being received as Earl of Mar on the Union Roll, in prejudice of the heir-general, the direct and lineal representative of Robert Earl of Mar in 1438, as recognised by supreme Scottish authority—the service of 1565, the Act of Parliament of 1587, and the decret of the Court of Session in 1626. I prefaced the *rationes* of this Protest by a statement of facts as to the law and usage of Scotland affecting territorial earldoms, and by a sketch, necessarily very brief, of the history of the Mar Earldom,—pointing out that the present Earl does not stand in the position of an “unsuccessful claimant” of a dormant dignity; while, by the Scottish law and presumption of succession, he would be entitled, as heir of line, to the Earldom of 1565 (the Earldom claimed by Lord Kellie), were such a dignity in existence, no less than he is to the ancient and existing Earldom holding its precedence from 1404, of which he is actually in possession. “In no possible way, therefore,” I protested, “can there be any one entitled to vote in right of the one and only Earldom (of Mar) standing on the Union Roll and the Decreet of Ranking, except the heir-general.” I had been anxious to protest likewise against the Order, on the ground of the nullity of the Act of 1847, but my friend Mr. Maidment discountenanced this, I presume as premature, and I acquiesced, having great confidence in his discretion and judgment. He was then very ill, in rapidly declining health, and has since died, to the grief of his friends, who lament in him a profound authority on matters of Scottish genealogy, peerage law, and philology, and

to the special disadvantage of myself, who had calculated on submitting these present Letters to his observation and criticism. Of the *rationes* of this Additional Protest I need only cite those of a more general character, founded upon principles of law which stand opposed to the views recently promulgated in the House of Lords, and which were severely commented upon by members of the meeting at Holyrood, at which the Protest was presented. They are as follows, and I add a word or two of comment to each —

“ I. By the Treaty of Union between England and Scotland it was covenanted that the laws, customs, and usages of the latter kingdom should be held sacred, and in no manner of way violated; and the inhabitants thereof should not be judged by any other law than their own.” Even if the House of Lords possessed legislative power in its ordinary sense (granting this *pro argumento*), the supersession of (for example) the Scottish rule of succession, and the overruling of the final Decrees of the Court of Session, would be in violation of the solemn compact between the two sister nations, and thus *ultra vires* of the House.

“ V. By the Treaty of Union no power is given to the Crown, Parliament, or Courts of Law in England, to challenge the rights of any Scottish subject to his estates or dignities. Where such is intended, it must be done in the Supreme Court of Scotland, and decided—not by the law of England, but by that of Scotland only.” Neither Parliament, through such legislation as that of 1847, nor *a fortiori* the House of Lords, even were its assumed character as a court of law with jurisdiction over dignities recognised, can legally interfere to debar Lord Mar from exercising his right to vote, or bring his right to adjudication before the House, through the machinery of the Act of 1847. It is only the Court of Session that is competent to move in the matter.

“ VII. A Committee for Privileges has no power to create a Scottish, or indeed any other, peerage; and in the present instance, where there is not the slightest evidence by writ or other competent proof that a new peerage of Mar was ever created, their Resolution, although con-

firmed by the Peers and approved by the Sovereign, is inoperative, and must be held null and void." Lord Kellie has more than once in his recent Letter called attention to this passage, citing it on the second occasion of reference as a general proposition, and as illustrative of the "general contempt with which," according to his Lordship, I treat "decisions of the House." The context will show the sense in which I used the words, and maintain their correctness. I granted indeed more than I should have done; for the approval of Her Majesty was, as I have shown, taken for granted by the House of Lords when they issued the Order, 26th February 1875, without waiting for that approval, and thus without warrant—the House being *functus officio*, as already shown, at the time and indeed ever since.

"IX. As, after the Union, the Crown had no longer the power to create a Scottish Peer, the instrumentality of a Report of the Committee for Privileges, approved of by the House of Peers, cannot enable Her Majesty to do that which she has no constitutional power to do." And yet such is the inevitable result of the late decision, the more especially since the acknowledgment by the House that the speeches in Committee for Privileges are not to be imported into the Resolution of the 25th and 26th February 1875. Practically, the intervention of the Sovereign being now excluded from the consideration of the House, the creation in question is by the sole authority of the House of Lords, and it may be imagined with what horror the wise and learned Lord Chancellor Eldon would have contemplated such a thing,—he who exclaimed—"But for God's sake let not the House by mistake make a peer!"

The Earl of Stair did me the honour to adhere to my protest in a separate protest of his own. The Marquess of Huntly protested "against the vote of the Earl of Kellie being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, created in 1565, and resolved to belong to the Earl of Kellie, is not the Earldom on the Roll of Scottish Peers." The Earl of Galloway, in a protest likewise lodged, objected "to the Right Hon. Walter Henry Erskine Earl of Kellie answer-

ing to the title of Earl of Mar on the Union Roll ;” and protested “ against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, alleged to have been created in 1565, and resolved to belong to the Earl of Kellie, is not on the Roll of Scottish Peers ; and further, seeing that the Right Hon. John Francis Erskine, Earl of Mar and Baron of Garioch, is the undisputed heir-general and next of kin of his uncle, the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, and that the said John Francis Erskine Earl of Mar, having legally qualified himself as successor to his said uncle according to the forms competent to the peers of Scotland, is thus in exactly the same position as every other Scottish peer ; and further, seeing that his position has been in no way affected by the decision in 1875, which conceded to the Earl of Kellie a Mar dignity by an alleged new creation in 1565, it follows that the said John Francis Erskine is now *de jure* and *de facto*, by the laws of Scotland reserved inviolate by the Treaty of Union, the actual tenant of the ancient and only Earldom of Mar on the Peerage Roll of Scotland : And I hereby protest against his vote as Earl of Mar (should it be tendered) being rejected, and against his being at any time and in any way denied rights and dignities he inherits as representative and holder of the said ancient and only Earldom of Mar on the Union Roll of Scottish Peers.” Viscount Stormont (Earl of Mansfield in the Peerage of the United Kingdom) and Viscount Arbutnot protested in the same terms, “ of adherence to Lord Galloway’s protest.” Lord Strathallan likewise protested “ against the vote of the Earl of Kellie being accepted in right of the dignity and Earldom of Mar.”

Mr. Keir, advocate, who presented all these Protests, requested that they should be recorded in the Minutes of the proceedings. The Lord Clerk Register said “ that the Protests would be received with respectful consideration ; but in regard to the proposal that they shall be recorded in the Minutes of the day’s proceedings he would consult his learned friends.”

Lord Elphinstone then addressed the assembled Peers on the subject matter of a paper which had been circulated along with my intended protest in print some days before the election, and which he thought was written by myself, which it was

not; nor was I cognisant of it, being absent on the Continent at the time. The mistake was natural, and the explanation simple, though I had not unfortunately the opportunity of explaining the matter. Passing to the Protest itself, Lord Elphinstone took exception to various items, the most important of which were as follows:—

“The Earl of Crawford summed up in this way:—‘By the Treaty of Union between England and Scotland it was covenanted that the laws, customs, and usages of the latter kingdom should be held sacred, and in no manner of way violated; and that the inhabitants thereof should not be judged by any other law than their own.’ They were certainly under subjection to the Courts of Appeal of Great Britain, so that that was a statement he was not prepared to admit.” On this I must remark, the covenant and provision is matter of fact, notwithstanding Lord Elphinstone’s indisposition to admit it; and the manner in which the practice of appeal from the Court of Session to the House of Lords grew up through a practical usurpation by the latter body may be seen in the paper in my Report of the Montrose claim, elsewhere referred to. Facts, not words, are in question. “Further on the Earl of Crawford said, referring again to the Treaty of Union, where any question was raised, ‘it must be done in the Supreme Court of Scotland; and decided, not by the law of England, but by that of Scotland only.’ So that the Peers of Scotland, it would appear, were a select body who were not to be governed by the laws of England; or rather he should say, Great Britain, but were independent of them, above them, beyond them!” The apostrophe and the climax here are admissible in rhetoric; but the question at bottom is, What says the Treaty, and have I misquoted it? “Then again the Earl of Crawford went back to the Peerage of Mar and said, ‘There being no Peerage of Mar on the Union Roll other than that which is referred to the ancient territorial Earls, and was afterwards in possession of John, subsequently attainted for high treason, and no claim for any new Earldom having been advanced in the Ranking and Decreet pronounced in March 1606, it follows as a necessary consequence that no new creation was made, and that the assertion that there was such is unfounded.’ That was defying the decision of the House of Lords. ‘The allegation,’ the clause

proceeds, 'to that effect maintained by the Earl of Kellie is therefore not grounded on fact, and must be rejected.' Were they to reject the decision of the House of Lords? That was what the clause wanted them to do. Then, in the 7th clause," continued Lord Elphinstone, "the Earl of Crawford said what was perfectly true, viz. 'A Committee of Privileges has no power to create a Scottish, or indeed any other Peerage'—no one said they had—and in the present instance, where there is not the slightest evidence by writ or other competent proof that a new Peerage of Mar was ever created, their Resolution, although confirmed by the Peers'—he seemed to forget that the Committee of Privileges was simply a Committee of the House of Lords, and any act confirmed of them was an act of the House of Lords; but he does not stop there, and adds, 'and although approved of by the Sovereign, is inoperative, and must be held null and void.' Therefore they were called upon"—I must really interpose to remark that Protests are not addressed to the Peers present at elections for the purpose of their criticism and for adjudication to follow upon them, but merely communicated to them as appeals for remedy of law before a very different tribunal—"called upon," according to Lord Elphinstone, "to set aside a decision of the House of Lords, and not only that, but one that had the approval of the Sovereign, as inoperative, and as one that must be held to be null and void. He never read such a statement in all his life. To have passed that document by in silence would have been to give a tacit approval to it. He would not do that, and that was his reason for calling attention to the salient points of the document."

I give this speech tempered by my own criticism, inasmuch as it would be impossible to illustrate more forcibly, more dramatically, the impression current among Lord Kellie's friends, the champions of heterodoxy, on the whole cycle of views and facts which form the subject of this Letter, these views and facts coming into play with reference to the elections at Holyrood, and the discussions in the House of Lords in regard to them.

The Marquess of Lothian supported Lord Elphinstone's criticism upon my Protest, which, he said, "was couched in terms, if it were to be received, too improper to be passed by

in silence by their Lordships." Independently of the "salient points," which Lord Elphinstone had dwelt upon, he would "call attention to one or two other points which it would be impossible for him or any other passing over in silence. The first of these points in the Protest of Lord Crawford was against this reception of the vote of Lord Kellie—they would call him so for the moment—as the Earl of Mar. He did not wish to judge in any way whatever as to the right of the two claimants for that Earldom. He had not gone into that, and not only could not, but did not wish to go into it. But the House of Lords, the Supreme Court of Great Britain"—the reader will observe the position taken up by my noble critic; he will not even satisfy himself as to the respective right of those whom he styles "the two claimants for that Earldom," thus representing the heir-general as a claimant, and the Earldom in dispute one and the same Earldom; but pins his faith absolutely on the assumption that the House of Lords has power to decide upon the question of law in the character of the Supreme Court of Great Britain! "But the House of Lords, the Supreme Court of Great Britain, having decided that the Earl of Kellie was the proper person to possess the title of Mar, they" (the assembled Peers) "had no jurisdiction in the matter any more than the Lord Clerk Register, who was to receive his vote as the Earl of Mar. Therefore he thought it was most improper in the Earl of Crawford to protest against that vote, for the reason that they had no jurisdiction. It ought not to have come before them. It should have gone to the House of Lords at the time they were deciding upon the matter." My opinion is different from that of the noble Marquess, as above intimated. "If it was possible that Francis Goodeve Erskine could prove his claim to the earlier title, he would not be sorry to see that one of the oldest creations of Scotland had been revived,"—a graceful and kindly concession in the spirit which manifested itself in the *salvo* of the Duke of Buccleuch's Resolution, and elsewhere in 1877. "But that was not the question before them. It was the title of the Earl of Kellie to answer to the [call of] Earl of Mar. That had been decided, and it was not in their power to say 'yes' or 'no' to that. On reading the 5th clause, as to the jurisdiction of the Courts, one would think that Lord Crawford and Balcarres

had existed two centuries ago—before the Union. That clause in this Protest would have been perfectly right in 1700, but at the time of the Union, in 1707, the possibility of such being presented would seem to have disappeared. There was no such thing as a Supreme Court of Scotland having any jurisdiction whatever over England.” I give this as it is reported;—if correctly reported, I cannot understand it. “By the Union Peers became not Peers of Scotland only, but also of Great Britain; and therefore it lay not with a Court of Scotland, but a Court of Great Britain, to decide who were the Peers of Great Britain. But suppose the Courts of Scotland were to decide these *prima facie*, there was power of appeal to the House of Lords.” That, I may remark, opens a very fundamental question. “More than that, the Court of Session had never, in his knowledge, attempted to decide on any question as to the dignities of Peers of Great Britain.” Lord Lothian evidently never heard of the Lovat case in 1730. “He thought it right therefore, apart from other grounds—and while he thought it was quite right the Protest should be received—to call attention to the Protest as not a proper one to bring before their Lordships on that occasion.”

Lord Saltoun then spoke in thorough agreement with what Lord Elphinstone and Lord Lothian had said; but with the following additional statement. “No one,” he said, “could be more sorry than himself to think that one of the ancient Earldoms of Scotland should have come to an end; but it had been decided by the competent tribunal, whose duty it was to decide such a question, that it had come to an end; and therefore he thought the matter should now rest.” Lord Saltoun overlooked the fact here that the House of Lords and the Select Committee of 1877 expressly laid it down that the Resolution of 1875 affirmed nothing of the kind—and that the question whether the ancient Earldom had “come to an end or not,” was still an open one. Lord Saltoun concluded by presenting a counter-protest against my “Additional Protest,” “in respect that the words used in the 7th section (*i.e.* reason) of the said Additional Protest, viz. ‘In the present instance, where there is not the slightest evidence by writ or other competent proof that a new Peerage of Mar was ever created, their Resolution, although confirmed by the Peers and approved of by the Sovereign, is

inoperative, and must be held null and void (which words refer to the Committee of Privileges)—call in question and repudiate the judgment of the House of Lords, of date the 25th day of February 1875, on the Mar Peerage claims”—*one* claim only, I must interpose having been made and having been reported upon—“transmitted to the Lord Clerk Register by the Clerk of the Parliaments, together with an Order of the House of Lords of date the 26th day of February, referring thereto.” Lord Saltoun added that “he thought it necessary to make this Protest, because he held that they were there now all Peers of Great Britain, with the exception of the limitation of not having the right to sit and vote in the House of Lords, which applied to all except the Representative Peers. Now that they were all Peers of Great Britain, they should maintain their right to be tried and judged by the High Court of Great Britain, and not by any Court of Scotland.” Assuredly, if it were a case of treason; but Lord Lovat was so tried and judged as a Peer, not on a report by a Committee for Privileges of the House of Lords, but in virtue of a solemn and final judgment fifteen years before by the Court of Session. What would Duncan Forbes have uttered on hearing such words fall from a Peer of Scotland! “He thought it was of great importance that they should maintain their rights which were given to them by the Act of Union.” I quite agree with Lord Saltoun, but ask, What rights, and by what article of the Treaty?

Lord Balfour of Burleigh adhered to the Protest of Lord Saltoun.

Lord Galloway then stated that he wished it to be “clearly understood that the terms of his Protest were these, that his noble friend opposite him should not be allowed to give his vote as the Earl of Mar for this reason, that he did not consider that the House of Lords gave any judgment in this respect, that he was entitled to the Earldom of Mar as upon the Union Roll of Scotland. He held that it was only as being upon the Union Roll of Scotland that they were then entitled to give their votes.”

“The Earl of Mar and Kellie” then asked that the Order of the House of Lords sent down in 1875, “ordering that the Lord Clerk Register should call upon the Earl of Mar in his place on the Roll, and receive his vote,” should be read; which was done, and the subject dropped.

## SECTION II.

*Debate in House of Lords, 11th July 1879.*

The Debate in the House of Lords on the 11th July 1879 proceeded on some questions put by the Marquess of Huntly, originating in the uncertainty in which Lord Huntly himself and Lord Mar's other friends had been left by the answer of the Lord Clerk Register to Mr. Keir's request at the election of the 11th March previously, that the Protests then tendered should be recorded on the Minutes of the proceedings at Holyrood. The Debate was very interesting; some new points were brought under consideration by Lord Huntly on the one hand and Lord Redesdale on the other; and the speeches of the law Lords, Lord Chancellor Cairns and Lord Selborne, more especially the latter, were very important. I give the following Report, as before, from the *verbatim* notes of the stenographer, abridging those of the lay Lords, but not of their legal brethren:<sup>1</sup>—

Lord Huntly commenced by reviewing the proceedings which had led to the appointment of the Select Committee in 1877, and called attention to the adoption of the Act of 1847 as the basis of the recommendations given in the Report of the Select Committee, the Act providing that if two Peers (whose right to vote is unchallenged) protest against a vote tendered at Holyrood, the Lord Clerk Register shall forward the Protests and Minutes of Proceedings to the House of Lords, for the House to take action upon them as it shall see fit. Lord Huntly stated that various Peers, personally present at Holyrood, had protested against the vote of the Earl of Kellie being received in respect of the Earldom of Mar standing on the Union Roll; and he asked whether a certified copy of the proceedings had been forwarded by the Lord Clerk Register and had been received by the House. "I want to know whether any notice has ever been taken of the Protests that were made against the vote of the noble Earl in respect of the Earldom of Mar as it stands upon the Union Roll; and I want to know what your Lordships intend to do upon the matter, because the Statute goes on to say that the House of Lords may order the

<sup>1</sup> The Debate is given *in extenso* in Appendix No. III.

peer whose vote or claim has been so protested against to establish the same before the said House." This was, in effect, I may interpose, an attempt to turn the weapon which the Select Committee had resorted to against Lord Mar's opponent,—very ingenious, but which laboured under the defect of an insufficient acquaintance with the object and limitation of the Act; while the answer given by the Lord Chancellor (Cairns) might have been more effective but for the same cause. "The Lord Clerk Register," observed Lord Huntly, "is in this predicament: he has either accepted a vote from a peer holding a peerage which is not upon the Union Roll, or he has allowed a peer to vote for a peerage under the protest of two peers present without transmitting a report of the proceedings to the House, and in defiance of the Report of the Committee for Peerages" (Lord Huntly meant, evidently, the Report of the Select Committee), "affirming that the holder of the peerage," *i.e.* Lord Kellie, "has not made out his title to the more ancient Earldom." This Lord Huntly characterised as a very awkward predicament for the Lord Clerk Register, "and a very painful one for the Peers assembled," under the uncertainty "whether a vote should be received for the ancient Earldom, and whether a protest should be acted upon or not."

Lord Huntly further opened new ground in expressing his opinion that the Lord Clerk Register "and the authorities guiding him" had done more than this, inasmuch as "the vote which was received and tendered by the noble Earl opposite" (Lord Kellie) "was upon a Peerage which was under attain." "The position," he said, "is a very simple one. Mr. John Francis Erskine, in the year 1824, appealed to the Crown to be restored to the titles and honours of his grandfather, who was attainted in the year 1715. That Petition was referred to . . . Sir John Copley, afterwards Lord Lyndhurst, and the other law officers of the Crown. . . . The law officers reported that the grandson of the attainted Earl had made out his title and proved his pedigree—solely through his mother," ignoring Mr. Erskine's father and the male heirship, and only mentioning him "as the legal consort of Lady Frances," Mr. Erskine's mother. "Now the Earldom of Mar was placed on the Roll at a date previous to the Earldom of Rothes, which is 1457. There is no reason to fix the date, but the Earl of Mar was

placed on the Roll distinctly previous to the Earl of Rothes. Any Earldom of Mar except the one restored through the female succession distinctly could not have been excluded from the attaint. The Peer who holds the title given to him by the Committee for Privileges, dating from 1565, is still under the ban of attaint,—it has never been removed. Still, even under this attaint, he is allowed to vote as Earl of Mar upon the Roll, and holds a Peerage under the Resolution of the Committee of Privileges, which was not restored by the Crown under the Report of the law officers made in 1824.” The objection, as I understand it, is this,—“that, seeing that, according to the House of Lords, John Earl of Mar, attainted in 1715, held the Peerage of 1565, proved to have been limited to heirs-male of the body, whereas the Peerage restored in 1824 was a dignity descendible to heirs-general, and inherited by Mr. Erskine on that tenure exclusively, as by the Report of Lord Lyndhurst and his colleagues, it was the latter dignity only that was restored, while that of 1565 is still under attaint; and Lord Kellie is incapacitated from voting and the Lord Clerk Register from receiving his vote while that attainder is unremoved.” Lord Huntly, at a later period in his speech, asked, “Ought not the noble Lord to be prevented in some way from tendering his vote for a peerage which is not on the Union Roll, and which is still under attaint, if it exists at all?”

Lord Huntly further inquired, “Can the Lord Clerk Register call that new Earldom of Mar, which was created in 1565, in any place upon the Union Roll at all, when the Resolution of the Committee of your Lordships’ House,” *i.e.* the Select Committee, “say that the order of precedence must never be altered?”

He concluded by expressing his expectation “that after the Report of the Select Committee no vote would have been taken from the noble Lord opposite upon an Earldom of Mar of an anterior date to the one which he was decided to hold”—an expectation in which he had been disappointed. “But a general election, I believe, may take place soon, and what will be the result? . . . You will have certainly nine or ten Peers of Scotland protesting most strongly against a vote being received. I for one think that this is a question that affects every Peer of Scotland in a most important degree; and I shall certainly continue my protest against any vote being received

upon a peerage as being upon the Roll which does not exist there."

The Lord Chancellor (Cairns) prefaced his reply to Lord Huntly by declining to follow him in the discussion he had raised "with regard to the Mar Peerage. I cannot myself imagine," he said, "what possible purpose would be served by pursuing a discussion of that kind in this House after the decision at which the House has arrived."

"The noble Marquess," Lord Cairns proceeded, "had communicated to him previously the two questions he proposed to ask.

"The first question was, 'Was the Lord Clerk Register justified at the recent election at Edinburgh, when the Mar Peerage was called in the course of calling over the Roll, in receiving an answer from the noble Lord (the Earl of Mar and Kellie)?' The view of the noble Lord who has just spoken upon that subject I understand to be this,—that the peerage which is called in the Roll the Mar Peerage is not the peerage which, according to the view of the noble Lord, has been adjudged by this House"—the noble and learned Lord does not say reported upon to Her Majesty—"to the Earl of Mar and Kellie, and therefore the Earl of Mar and Kellie should not have been allowed to answer when it was called. That, my Lord," said the Lord Chancellor, "depends upon the meaning of two Resolutions of your Lordships' House. I have no right to interpret them, but I will state them for your Lordships' consideration, and I will state also what I understand them to mean."

These two Resolutions were, according to the noble and learned Lord, the Resolution of the Committee for Privileges, reported to the House, and "adopted by the House"—any allusion to its being laid before the Queen, as superior judge, being omitted, and the power of the House to act upon the Report summarily, and apart from the approval of the Queen, being taken for granted; and, secondly, the order to the Lord Clerk Register, passed in the same breath with the adoption of the Resolution, and already sufficiently familiar to the reader. Lord Cairns then proceeded as follows:—"Now the Roll of Peers in Scotland is a public document, which is perfectly well known; and in that Roll of Peers there is one entry, and only one entry, of the Earl of Mar. It may be in its wrong

place, or it may be in its right place—I have nothing to say as to that. It is there, and it is only in one place, and to that place this Resolution must necessarily have referred; for there was nothing else that it could have referred to. Therefore the Order of your Lordships' House to the Lord Clerk Register is this—that he is to call the title of the Earl of Mar according to its place in the Roll of the Peers of Scotland. He has no authority to put it in a different place; he must call it in the place where he finds it; it is only found in one place: and when he calls it, and it is answered, he is ordered to receive and count the vote of the person who has been adjudged to be Earl of Mar and Kellie in answer to that call. I cannot myself see that any question can really arise as to the duty of the Lord Clerk Register. The Order of your Lordships' House speaks for itself. The Lord Clerk Register has nothing to do but to obey it. He is to call the title and receive the vote of the proper person when he calls it. That," concluded Lord Cairns, "is the first question." The misfortune, I must add, appears to me to be this—that the Earldom discovered by the House of Lords in 1875 does not exist on the Roll. Lord Cairns's argument amounts to this—Because the House has resolved that an Earldom of Mar never before heard of was created in 1565, distinct from the ancient Earldom of Mar, therefore the Earl of Mar on the Union Roll, which is ranked as the ancient Earldom, long before 1565, must necessarily be the modern Earldom and not the ancient one; and the Union Roll must be read in conformity with, and if necessary corrected and construed by, the Resolution of the House, and not *vice versa*, the Resolution by the Roll, on the principle of priority of obligation. Lord Cairns is not at liberty, I submit, to leave the question of the accuracy or inaccuracy of the Roll in a state of doubt. If he contends that the Resolution of the House is right, the Union Roll must be wrong—which leads again to the question, Which of the rival authorities is of prior obligation? He is obliged to fall back on the position originally taken up by Lord Redesdale, that the decision of the House, affirmed in the Resolution adopted by the House, is final and irreversible, right or wrong—a decision which in its effects, to say nothing further here, strikes at the foundation of the decision in favour of the Sutherland heir-general in 1771.

“The second question,” continued the Lord Chancellor, “is this—Protests were entered, as I understand”—the noble and learned Lord having never, it would appear, seen them—“at the recent election against the Earl of Mar and Kellie being allowed to answer to the call of this peerage; and the noble Lord asks me, secondly, Ought not the Lord Clerk Register to have returned those protests on the whole of the proceedings to the House of Lords in pursuance of the Statute of the 10 and 11 of the Queen, chap. 52? That, again, depends upon the words of the Statute, which seem to me to be reasonably plain. The Statute says that if at any meeting for the election of Representative Peers any person shall vote, or claim to appear or to vote, in respect of any title of peerage on the Roll called over at such meeting, and a protest against such vote or claim shall be made by any two or more peers present, whose votes shall be received and counted, the said Lord Clerk Register or Clerks of Session shall forthwith transmit to the Clerks of the Parliaments a certified copy of the whole proceedings at such meeting; and the House of Lords, whether there shall be any case of contested election or not, may, in such manner, and with such notice to such parties, including the person so voting, or claiming to appear or to vote in respect of such title of Peerage, and the persons protesting, as the said House shall think fit, inquire into the matter raised by such protest, and if they shall see cause, order the persons whose vote or claim has been so protested against to establish the same before the said House; and if he shall not appear, or shall fail to establish the claim, then the House may order that he is to be put to silence in the future. That applies, of course,” said the Lord Chancellor, “to a case altogether different from a case like the present. The meaning cannot be that the Lord Clerk Register is to transmit the protests which were made on the occasion of the recent election to this House, in order that the Earl of Mar and Kellie may be called upon to establish his title here, because he has done that already. The House says he has established his title; and the meaning of the statement cannot be that the Lord Clerk Register, as regards a person who has established his title, is to go on transmitting protests against that title to this House, in order that he may be called upon to establish his title a second time. It obviously means

that if there is a protest entered against any person who has not established his title, that protest is to be sent to the House of Lords in order that the House may call upon him to establish his title in due course." I am bound to say that I think that the Lord Chancellor's answer on this point was satisfactory on the common premises assumed by the question replied to. I think, indeed, that it was rather imprudent to say or do anything which could give the slightest apparent sanction to the Act of 1847. But this I may remark, that Lord Cairns would not have spoken of the Act as "obviously" meaning what he asserted it to mean in the last paragraph here cited—placing an interpretation on the Act, and commending it to acceptance on the ground of common sense—if he had had the Act in its integrity before him in the Select Committee, or had it been printed in the Appendix to the Report of that Committee, seeing that the preamble of the Act and its context distinctly prove that the Act was directed solely against pretenders to "dormant or extinct peerages," "peerages which have been for some time dormant,"—pretenders of the type of the Annandale, Stirling, and Crawford claimants, with whom it is impossible that Lord Mar, the nephew and next of kin of the late Earl, can be classed, seeing that by the law of Scotland he succeeded to the dignity *de jure* and *de facto* at the moment of his uncle's death, and is entitled to hold and be recognised by it till the heir-male, Lord Kellie, proves an exception to the rule of succession in his own favour, which he has not done, never having claimed the original Earldom of Mar. "These," concluded Lord Cairns, "are the answers which I should respectfully offer to the questions put to me; and I do not desire to take any further part in the discussion which the noble Lord has raised."

Lord Blantyre followed by a few words, expressing his conviction that "the decision of the House in the Mar Peerage case was a very unhappy one. . . . The whole case," he observed, "turns upon whether Queen Mary in the year 1565 restored the old Earldom of Mar, or whether she made a new creation." "It is repugnant to common sense to suppose that Queen Mary, in place of giving to the Erskine family that which they possessed for twenty years, from 1435 to 1457, and which they claimed for more than a hundred years after that,

that is to say, when the new trial was granted to them," through the inquest of 1565, "made a new creation, and gave them a new Earldom of Mar. Upon these grounds I think that the decision of the House was an unhappy one, and that the Earldom is now held by the wrong person."

Lord Redesdale spoke at great length, enforcing some of his former arguments, and developing others in support of the Resolution of 1875. He said, "It appears to me an extraordinary thing that any peer should rise to contest the decision of this House upon a point upon which no other body could decide but the House;" in further exclusion, it will be observed, of the jurisdiction of the Sovereign, which neither in the present debate, nor in that on the Duke of Buccleuch's Resolution, has ever been recognised by those who maintain Lord Kellie's right. He proceeded, "By the Act of Union with Scotland, the Peers of Scotland are placed in precisely the same position in all respects as the Peers of England and other peers; and there is certainly no privilege that the peers of this country hold more dear to them or more important than that this House is the sole judge as to whether they are entitled to their honours or not." This is plain speech, and I hope my reader will take notice of it, for Lord Redesdale speaks out, while others beat about the bush. The Peers of England may flatter themselves that they possess this privilege, if privilege it be; but the jurisdiction, as I have abundantly proved, is not in the House of Lords by law, and consequently there can be no such privilege for the peers of Scotland to participate in even were they anxious to do so. It is a fallacy to confound the right to a peerage with the privileges of that peerage, where the right has been ascertained in a particular person—these are two very different things. Lord Redesdale proceeded to make a very true observation:—"None but those who have gone into the whole case, and have investigated the evidence that was brought forward, are really competent to pronounce an opinion upon it. To pick up small matters from other authorities, like those which were brought before the House on that occasion, is not a fair way of discussing the question." But the question is, I must remind the reader, Through what spectacles is that evidence to be looked at and read? By the law of Scotland, or the private rules of

the House of Lords contradictory of that law, and which the House have virtually admitted they are incompetent to make and apply, as possessing no power of legislation? Who are most likely to apply the law of Scotland correctly, English lawyers, or men like the late Mr. Maidment, Mr. Riddell, and that great feudal lawyer and historian, Lord Hailes, under whose influence, based upon evidence which Lord Camden confessed to be "irresistible," the House of Lords advised the King in favour of the heir-general of Sutherland, on the ground, *inter alia*, that the Earldom of Mar, existing long before the dawn of history, was a dignity descending through females? Lord Redesdale's profound and conscientious study of the Minutes of Evidence in the Mar claim would have been productive of results favourable to the heir-general but for his preconception of Scottish law having been derived, not from original Scottish sources, but from the spurious code originated in 1762 and 1771 under the auspices of Lord Hardwicke, Lord Mansfield, and Lord Camden, and transmitted as a precious inheritance to the House of Lords to the present day.

Lord Redesdale then took up the question of the authority of the Decreet of Ranking and the Union Roll. He cited, first, the Order of the House passed on reception of the Union Roll, or list of Peers for Scotland, that it shall be entered upon the Roll of Peers, and that a *salvo* should be inserted to the effect that "the protests entered upon the records of the Parliament of Scotland in relation to the precedency of Peers . . . shall be and are of the same force, with relation to the table of precedency, as if they were entered upon the Roll of Peers and in the Journals of the House of Lords." "Thereby," said Lord Redesdale, "the House recognised its authority over these disputes with regard to precedency, and that Order was acquiesced in from the time that it was made." On the contrary, I must protest, the House recognised the authority of the Court of Session over these disputes, as was shown by their recognition of that authority in the case of the Earls of Crawford and Erroll in 1769-71, elsewhere spoken of. The protests in the Scottish Parliament were not for remedy of law at the hands of the Parliament, but of the Court of Session, under the provision of the Decreet of Ranking in 1606, and in accordance with the constitution of that Court by Statute in 1532. The

protests at Holyrood are necessarily to the same tribunal; the Lord Clerk Register has no option but to receive and record them in the view of their being subsequently acted upon, and accessible in the meanwhile to all parties interested. Whether it is equally incumbent on the Lord Clerk Register to transmit them to the House of Lords in ordinary cases, further than as matter of courtesy, for the information of the House, I cannot say; although in such cases of protest as those pointed out by the Act of 1847, it would (admitting the competency of that Act *pro argumento*) be obligatory. I speak always with diffidence when a question arises upon which I have not had the advantage of knowing the opinion of men like Mr. Riddell or Mr. Maidment; but these, my valued friends, are both gone to a less litigious world, and I am thus deprived of their advice and guidance. The Order spoken of by Lord Redesdale has undoubtedly been acquiesced in, but simply because it was in strict accordance, as well as the *salvo* spoken of, with the conditions of the Treaty of Union.

Lord Redesdale proceeded to say that although "the precedency has been at times interfered with, that is to say, proof has been given of a different precedency from that which appeared upon the Union Roll, based upon the Decreet of Ranking," yet "the House has never altered the precedency in any of these cases, notwithstanding that by the clearest proof the date upon the Union Roll was shown to be wrong. It is quite evident that it is quite as easy that a date of higher precedency might have been granted as of a lower one. Of course it would not invalidate the peerage, although it was called as of a different date from that to which it was entitled."

Lord Redesdale then cited the case of the barony of Dingwall claimed by the Duke of Ormonde in 1710, and which a Committee for Privileges in 1711 recognised as in the Duke, and reported "that he ought to be placed next above Lord Cranstoun." The effect of that was to give him a precedency four places higher than he had claimed. "Therefore," Lord Redesdale argued, "the House obviously has had the power of determining where a peer shall be placed upon the Union Roll, and has acted accordingly." But this was a case of a peerage not on the Union Roll, being dormant at the time and ever

since 1621, the creation having been by charter, 8th June 1609; and in ordering it to be placed on the Roll in the place of priority to which the evidence showed it was entitled, even although the claimant had underestimated the position he was entitled to, it was a very different case from that of Lord Kellie, whose new Earldom of Mar has never been placed on the Roll, and cannot be so placed because there is no record or proof of its ever having existed; while, on the contrary, Lord Kellie has been thrust into the place of the original Earldom, to which he makes no pretensions whatever. This Dingwall case was an unfortunate one to bring forward. The particulars may be seen in my Report of the Montrose claim, in which I cited it in a chapter chronicling the "gradual encroachments of the House of Lords upon the authority of the Crown and of the Court of Session in Scotland in peerages," the former retracted, the latter persevered in, with continual expansion of English principle to the consideration of Scottish peerage-claims. I summed up the Dingwall case thus:—"The House, acting upon the mere strength of a casual rumour, and without any reference from the Crown, which could alone (on English principle) entitle them to interfere, originated of themselves *ex proprio motu*, referred to a Committee for Privileges, discussed and decided the case of the Scottish barony of Dingwall as claimed by the Duke of Ormonde, and which they ordained to be inserted in the Union Roll (having been long dormant, ever since 1621), immediately before that of Cranstoun. . . . It is hardly necessary to observe that, whether viewed by the principles of English or Scottish peerage law, this was in pure and indefensible assumption of a sovereign power and authority to which they were incompetent. And it would appear . . . that at a subsequent and soberer moment they felt that they had gone too far, for no similar instance has since occurred."

Lord Redesdale proceeded to argue that the Commissioners for Ranking in 1606 had ranked the Earl of Mar in such a manner as to show that it was their deliberate purpose not to recognise the earldom held by Lord Mar as the original earldom, the date assigned to it being, not 1404 but 1457. He referred to my Second, or Additional Protest, in which, he said, I "stated roundly that the precedence which was allowed by

the Decreet of Ranking was a precedence of 1404 upon that document. Now, my Lords, the precedence given was not of 1404, but of 1457. I will also remark that Lord Mar did not bring before the Commissioners for the Decreet of Ranking the charter by which the territorial comitatus of Mar had been ratified to his ancestor by Queen Mary. He gave in these other documents,"—the charter 9th December 1404 and the retour of 1588—"hoping that that surrender and regrant to Isabella would be the ground upon which his right to the peerage would be rested. Now, my Lords, the question is, Why was the precedency of 1457 given to the Earl of Mar by the Commissioners? I hold it to be a most distinct proof that they were determined that by no act of theirs would they recognise the existence of the ancient Earldom of Mar. Nobody could pretend that that was the date of the ancient Earldom of Mar, that is to say, of the Earldom held by the last heir-male, who died in 1377. The reason why they took that date, I believe to be that at that time there was an Earl of Mar sitting in the Scotch Parliament. James II. of Scotland had created one of his younger sons Earl of Mar, and therefore there was an Earl of Mar sitting in Parliament in 1457. If any one claims under the finding of the Decreet of Ranking, that is the Earldom of Mar to which he must make his title good, because this is the only one which is at all connected with the place on the Union Roll." On all which I have to remark—1. That Lord Redesdale himself, in his speech in 1875, held that the precedency granted was from 1404, and upon the charter 9th December 1404, but by a "fancy title." He has changed his opinion since. But that is of little consequence. 2. The postponement to Erroll, on which Lord Redesdale founds the date of 1457, is of no force, inasmuch as Erroll, like Marischal and Argyle, owed his precedency to the great hereditary office he held, as pointed out by Mr. Riddell in his "Peerage and Consistorial Law" as far back as 1842. 3. I do not know whether Lord Redesdale derived his information respecting the alleged creation of John, third son of James II., as Earl of Mar in 1457, from Mr. Fraser Tytler's History of Scotland; but in that historian's able sketch of the injustice perpetrated against the Erskines by James I. and James II., he concludes his account of the inquest of 1457 thus:—"It

was fortunate however for the monarch that the house of Erskine was distinguished as much by private virtue as by hereditary loyalty ; and that, although not insensible to the injustice with which they had been treated, they were willing rather to submit to the wrong than endanger the country by redressing it. In the meanwhile James, apparently unvisited by compunction, settled the noble territory which he had thus acquired upon his third son, John, whom he created Earl of Mar." It is possible that Lord Redesdale may have understood this as implying that the creation was in 1457, but it was only in 1457 that the inquest took place through which he acquired a right to the property ; he had only been married in 1449, and in whatever year the birth of his third son took place, it is impossible that he could have sat in Parliament in 1457, as affirmed by Lord Redesdale.<sup>1</sup> The whole of Lord Redesdale's argument therefore falls to the ground.

Lord Redesdale summed up what he had thus far said as follows :—"The effect therefore of what has taken place is this. The Report of those who gave judgment in the late case was that the Earldom of Mar was a new creation in the time of Queen Mary. That no other Earldom of Mar is in existence was proved, as I say,"—Lord Redesdale here expressing his individual opinion, personally, in recognition of the affirmation by the House that the speeches in Committee are not judgments, and that the speeches in 1875 were not final to the effect of extinguishing the original dignity—"was proved, I say, by the extinction of the ancient earldom for 500 years, during which time no representative of it ever appeared in any place in Parliament whatever. The entry therefore of the Earldom of Mar in the Decreet of Ranking of 1457 was an erroneous entry." (The reader will refer, perhaps, to my proof in Letter VII. *supra*,<sup>2</sup> that the earldom was ranked in its proper relative place as second among the earldoms whose place was governed by simple antiquity of creation, Sutherland having produced earlier evidence of antiquity than Mar.) "Everybody, whichever way he voted, will hold that that was not the proper place in which the Earldom of Mar should be put," viz., under 1457. "There is no doubt that the Earl of Mar in James VI.'s time desired to make good his claim to the ancient earldom, and he put in these docu-

<sup>1</sup> See note *supra*, p. 81.

<sup>2</sup> Page 79.

ments in order to maintain that claim, and kept back other documents, which might perhaps have induced the Commissioners, if they had been before them, to give him the other date of creation, namely, the same year in which the Comitatus had been restored to him," viz., 1565. All this I have answered in former pages of these Letters.

"Now, my Lords," proceeded the noble Lord, "if every peer is to determine whether a judgment of this House is right or not, and to act upon his own ideas as to whether the judgment is right or not with regard to a matter of this kind, confusion of the most unfortunate character must necessarily ensue. The decision of the House is that the person claiming to be Earl of Mar is certainly in the wrong place on the Union Roll, because they have found the time when they hold that that earldom was created," *i.e.* 1565; "but if the peers individually are allowed to come forward and say, 'We do not approve the decision of the House in this matter, and we shall go on disputing and protesting,' of course there will be nothing but confusion henceforth in the elections of Peers for Scotland."

Lord Redesdale then reverted to the Duke of Buccleuch's Resolution:—"I think, my Lords, that there was great reason for the motion that was made by the noble Duke, of having an alteration in the date of that peerage upon the Roll. At the same time there is no doubt that if we once begin to make alterations in the Union Roll, there are so many errors in it that the claims that would be made for an alteration of precedence would be such as would give the greatest possible trouble and inconvenience to the House. Therefore it may be desirable to allow a peerage to be called in the wrong place rather than to take the trouble of altering that place." In this Lord Redesdale overlooked the opinion of the law Lords in the debate upon the Duke's Resolution, that the House has no power to make changes upon the Union Roll, and that it would be *ultra vires* to attempt it. I have elsewhere shown that no such alteration can be made legally except by the Court of Session, under the provisions of the Decreet of Ranking of 1606.

Lord Redesdale concluded by contrasting "the full inquiries which have been carried out by this House upon the subject" of the Mar case, with the inquiry by the Commissioners of 1606, "completed" as the Decreet of Ranking was "with regard to

the whole of the Scotch Peerage in a very short space of time—about a year, I think, and it was framed entirely upon whatever documents the peers themselves might think fit to bring forward.

“My Lords,” Lord Redesdale concluded, “having taken part in the judgment upon the Mar Peerage case, and having inquired into the matter very much since, and found out these points which I have just mentioned with regard to the fixing of places by the Decreet of Ranking, I have thought it my duty to state to your Lordships what, upon full consideration, I conceived was the reason for placing the Earldom of Mar where it was placed in the Decreet of Ranking. If the Commissioners had taken any vacant time when there was no Earl of Mar in Parliament, it might have been said that it was the old earldom, because no other earldom existed at the time; but they did not do this. They, purposely as it appears to me, took a time when there was an Earl of Mar in Parliament, and they fixed that as the date of the earldom; and if anybody has a claim to the earldom as placed in the Decreet of Ranking, and now on the Union Roll, he must claim the earldom which was granted by King James II. of Scotland to one of his younger sons; and that is an earldom which became extinct in 1475.” This conclusion, I need scarcely observe, Lord Redesdale’s final conclusion, is different from that arrived at by Lord Cairns and the Select Committee, which admits the possibility of the continued existence of the ancient earldom in the person of the heir-general—a possibility negatived by Lord Redesdale, but on grounds—the alleged sitting of an Earl of Mar in Parliament, not of the Erskine blood, in 1457—which will not stand the test of historical scrutiny.

The Earl of Galloway, in reply to Lord Redesdale, took exception to his treatment of the Decreet of Ranking, and vindicated the fact that the Earldom of Mar was ranked by the Commissioners of 1606, and upon the evidence of documents still extant, “with a precedence of more than a century before Queen Mary’s time.” He then passed to a more important point, viz., “that this House really was not competent to decide this question.” The suggestion was met by an “Oh! oh!”—and Lord Galloway proceeded, “Yes, my Lords! I see that my noble friend at the table (Lord Redesdale) is greatly surprised.

He condemns the Decreet of Ranking; he says that the Decreet of Ranking is nothing—he says that this House has power to alter any title it chooses. Well, my Lords, I say, according to the terms of the Act of Union, that is not the case. It was declared by that Treaty of Union in 1707 that a judgment of the Court of Session in the year 1626 was to be final and unalterable,”—or, to express this more categorically, that the privileges of the Court of Session, as delivering final judgment without appeal to King or Parliament, and the rights of Scottish subjects under the laws of the country being reserved inviolable by the Treaty, the Decreet of the Court of Session, *Mar contra Elphinstone* in 1626, was thus final and unalterable. Therefore, my Lords, I say that with regard to any question which was tried and decided by the Court of Session before the Act of Union, it is not competent for your Lordships’ House to reverse that decision now.” Nothing can be more correct than this.

“But,” proceeded Lord Galloway, “as was pointed out by my noble and learned friend on the woolsack,” *i.e.* in his speech on the Duke of Buccleuch’s motion, “Your Lordships’ House has never given a judgment upon this question. What it has given is not a judgment; for it is not a judicial proceeding; it is merely an opinion. My noble friend at the table” (Lord Redesdale) “shakes his head at that. I will state to him what was said by the noble and learned Lord on the woolsack, and what was said also by the late Lord Chelmsford in the year 1876 in this House. What was said by those two noble and learned Lords was this, ‘The opinion of a Committee of Privileges is not a judgment.’ Those are the noble and learned Lords’ own words. It was pointed out by my noble and learned friend on the woolsack that it was merely a ‘Report,’—that is the term which he used—it is a ‘Report’ of the Committee of Privileges to your Lordships’ House. The Report was adopted; but still, I say, it was not a judicial proceeding—it was not brought before the House of Lords as a judicial court—it was only a Committee of Privileges. I may be in error”—the noble Lord was not in error—“but, as I understand it, properly speaking, the Resolution should have been submitted to the Sovereign of these realms for her gracious Majesty’s approval. In the case of honours I believe that to be the proper course. But in this case, I am afraid, there was very great and unneces-

sary hurry; and, for some reason which has never yet been explained, the Resolution was immediately sent off to Edinburgh, without an opportunity being afforded for its being shown to the Sovereign of these realms first. I believe, my Lords, that that was a most irregular proceeding.

“My Lords,” continued Lord Galloway, “I say that this was not a judgment, but merely a Report, and that it was not by the terms of the Act of Union competent to your Lordships’ House to reverse a decision which had already been adjudged previous to the Union of the two countries. . . . As the noble Lord ” (Lord Redesdale) “has gone on so far into the details of this matter, I should like him to be kind enough to listen to what the judgment of the Court of Session in 1626 was. The Court of Session declared formally ” (I should not myself have used the words so unqualifiedly, because the declarator proceeded upon the formal attestation to that effect by Mary Queen of Scots in 1565, and by the Act of Parliament in 1587, but this comes to the same thing in reality),—“The Court of Session declared formally that the ancient Earldom of Mar was still in existence, descendible through female succession to heirs-general,—that the heirs had been temporarily deprived through illegal seizure and usurpation in 1457; but that these wrongs were redressed in 1565 by Queen Mary, whose charter restored to the heirs of the said Countess Isabel and their heirs-general hereditarily the ancient earldom, and which charter included the dignities, because”—Lord Galloway added, with perfect correctness, “patents of honour, independently of lands were unknown till many years afterwards. That,” continued the noble Earl, “I am sure my noble friend will admit?” But this fond expectation was met by a decided “Not even that!” from Lord Redesdale. Lord Galloway then in few words traced the succession of the ancient earldom down to the reversal of the attainder in 1824 in favour of the heir-general, succeeding (although, accidentally I may say, the heir-male likewise), exclusively through his mother as heir-of-line of the attainted Earl; and he called attention to the fact that “in the Resolution of 1875—your Lordships’ House carefully abstained from the remotest allusion to the ancient Earldom of Mar on the Roll, regarding which there was no claim before your Lordships’ House”—a most just distinction,—observing incidentally

that it could not have been otherwise, "because, as I have said, the case had already been decided by the Court of Session before the Act of Union." In this perhaps the noble Lord gave more credit for discrimination to the Committee for Privileges than could be justly claimed by them.

Lord Galloway then adverted to a possible belief on the part of noble Lords "who were ignorant of the law affecting Scottish peerages, that it is necessary for Lord Mar, who succeeded his uncle, and who at present is entitled to the dignity, to claim his right before your Lordships' House. But that," he proceeded, "is not the case. A Scottish peer is not required to do that. . . . The present Lord Mar was served heir to his uncle, and that is all that a Scottish peer is required to do in order to succeed to a title of dignity enjoyed by his predecessors,"—liable of course, it must be stated, in Lord Mar's as in any similar case, to proof of an exception in Lord Kellie's favour as collateral heir-male against the heir-general, the *onus* lying on Lord Kellie to claim and allege proof in support of such exception, Lord Mar being in full and unchallengeable possession till such proof is established conformably with the law of Scotland. "Any other course," continued Lord Galloway, "would not only be unusual and unnecessary—it would be contrary to Scottish usage. Scottish usage is treated with contempt by my noble friend at the table, I have no doubt,—still we had that law in Scotland before the Union,"—and he might have added, "have it now." "My Lords, I say that by the law of the land, on the death of a Scottish peer or peeress, his or her title passes *de jure sanguinis* to the next heir; and it rests with an opponent to upset the pedigree or to prove a different line of succession to the peerage, if possible,"—*i.e.* according to the law and presumption of the Scottish law of succession, which Lord Galloway thus founded upon with perfect correctness.

Lord Galloway then observing that all the protests that had been lodged at Holyrood were against Lord Kellie, and not one against Lord Mar, Lord Kellie interposed that he had himself protested at every election; to which Lord Galloway replied that he had not been aware of it, although confessing he "should have been inclined to make him an exception." But "my noble friend," he continued, "has ventured to get up and has answered to a title which your Lordships have named, and that he has

not got." These words, apparently indistinctly heard by the shorthand writers, raised cries of "No, no!" "Hear, hear!" "It is a fact," persisted Lord Galloway. "Does my friend at the table"—addressing Lord Redesdale—"venture to say that the House found that my noble friend near me (Lord Kellie) is entitled to a peerage which upon the Union Roll is put above the Earl of Rothes in 1457? Not one of the noble Lords says so." "I merely say," Lord Redesdale answered, "that he" (*i.e.* Lord Mar) "has not proved his right; and no one can prove his right to the title of Mar which was in existence in 1457, because it is not in existence now,"—Lord Redesdale thus taking his stand on his new view that the only possible claim would be to the earldom held by John Stewart, third son of James II., who died without issue, and not to the ancient Earldom of Mar, which, according to Lord Redesdale, became extinct in 1377. "Of course," rejoined Lord Galloway, "if my noble friend says it is not in existence, I suppose there is no disputing it, because"—he proceeded, in a playful allusion to a former part of his speech, in which he had represented Lord Redesdale as speaking of what took place before the Commissioners of Ranking in 1606, as if he had been a contemporary and eyewitness—"he has already informed us that he was living in 1606, when the Decreet of Ranking was framed, . . . what was done at the time, and . . . what we ought to do now."

After reminding the House of Lord Mansfield's speech in 1877, testifying to the manner in which Scottish Peers succeeded to their dignities, Lord Galloway concluded by calling the attention of the House to the fact that the Resolution of 1875, recognising a new peerage of 1565 in Lord Kellie, "never said one word about the ancient peerage on the Roll,—therefore that peerage remains intact at the present moment." He remarked on the force of the word "restituere" employed by Queen Mary in the charter of 1565 as applied to the dignity, and, on Lord Redesdale's interpretation that the charter only carried the "comitatus" or fief, and not the title, rejoined, "the comitatus always carried the dignity," refraining however from troubling their Lordships further upon that question.

"I am sure," Lord Galloway added, as he sat down, "that all your Lordships must remember that in your childhood you have in your copy-books, written in large hand, over and over

again, 'Be just before you are generous.' Now, my Lords, my noble friend near me" (Lord Kellie) "certainly cannot complain of any want of generosity at your Lordships' hands. I ask no generosity at your hands for the rightful heir, for him who has succeeded to the peerage . . . of the late Lord Mar. I say I do not ask any generosity for him ; but, my Lords, I do implore you to give him justice."

Lord Selborne then rose and expressed his views with his usual precision—views so important as the final expression of his opinion upon the main point which underlies the Mar question, views of a character so fatal to the rights and interests of the Peerage of Scotland, if not of the entire Scottish nation, that I shall give them *verbatim*, with the slightest possible comment on their secondary matter, but reserving the noble and learned Lord's main proposition for distinct remonstrance at the conclusion. The reader will judge whether he was entitled to adopt the tone of superior authority and stern admonition which distinguish his utterances from those of Lord Cairns.

"My Lords," he began, " I really hope that this discussion will be brought to a close. (Hear, hear!) It seems to me to proceed upon a forgetfulness of that which we all know ; and that is, that even this House is obliged to pay respect to the law. Now, with regard to claims to Scottish peerages, the law, as I understand it—and it is Statute law, and in that respect it rests upon higher ground than the law which relates to English claims of peerage,—is, that claims to Scottish peerages are to be investigated in a certain manner, not by a debate in this House, but in the manner which we all know is usual ; and the decisions so arrived at have the force of Statute law." This is the proposition which I reserve for examination at the close of this report. It is impossible to imagine a more important one. It is now laid down by one of the highest legal authorities in the House of Lords that whereas claims to English peerages are preferred and adjudicated upon in a certain manner which distinguishes such claims as a class apart, claims to Scottish peerages are, without exception, subject by Statute law to the determination of the House of Lords, exclusively, and that the decisions of the House have the force of Statute law, and must be submitted to as such, there being no appeal, no room for remonstrance, from or against such adjudication. As a Scottish peer

and Scottish subject, and knowing something of the law of Scotland affecting peerages, I protest against this affirmation of the noble and learned Lord at the outset. But to proceed,—

“I own, my Lords, that I think that if the noble Earl at the table (Lord Redesdale) had contented himself with saying that,” viz., that the House is by Statute law the sole judge in Scottish dignities, and that its decisions on such have the force of Statute law, “he would have done more wisely than by endeavouring to establish the soundness of the reasons upon which the decision upon the Mar Peerage case in the year 1875 proceeded. If these reasons are brought again into the region of discussion, it is but natural that opinions should differ upon them. But the truth is, we have no business at all to go into any such discussion. The House has decided, and that which it has decided is law. That decision is, that a certain Peerage of Mar was created by Queen Mary, and that it belongs to the noble Earl opposite. To that extent the whole House is bound.” Whether Lord Redesdale adheres to the doctrine of the noble and learned Lord, or not, I cannot say; but unless I heard it from himself I cannot believe it. Lord Redesdale has far too much experience of claims and knowledge of the relative law to acquiesce in such propositions.

“And for my own part,” continued Lord Selborne, “I take the same view of the construction of the Order” (26th February 1875) “referring to the duty of the Lord Clerk Register, which is taken by my noble and learned friend on the wool-sack; that is to say, that when the House said that the peerage was to be called as it stands upon the Union Roll, the Lord Clerk Register has done nothing wrong in taking the Union Roll as he found it, and, if there is only one Earl of Mar there, in treating that, for the present at all events, as the proper place for the Peerage which the House has declared to belong to the noble Earl opposite.

“I do not understand that the House has decided anything whatever, affirmatively or negatively, with regard to the ancient Earldom of Mar. What was said in the Committee of Privileges about it is a wholly different thing from a Resolution of this House. The Resolution of this House simply was in the affirmative, that the noble Earl opposite had established his right to the Peerage of Earl of Mar created by Queen Mary in

a certain year. This House did not say that the old Earldom of Mar was extinct; and it did not say that it would refuse to entertain a claim, if a claim should ever be brought forward by any person undertaking to prove that he was entitled to that old earldom. That question, I say, has never been decided by the House,"—thus, it will be observed, completely vindicating the repeated remonstrances of Lord Mar and his friends, that he has never been a claimant. "Last year, or the year before, when a petition was presented by the noble Earl opposite upon this subject, and a Committee was appointed by this House to consider the question so raised, that Committee pointed out that if any person thought fit at any election of Representative Peers for Scotland to claim an Earldom of Mar in addition to that created by Queen Mary,—that is to say, to claim the older earldom"—that is, strictly speaking, to claim to vote as tenant of the original earldom—"and if that claim was objected to in a certain manner by two peers, the proceedings must then be reported to the House, and the House could, according to the particular procedure prescribed by the Statute which has been quoted"—*i.e.* the Act of 1847, although Lord Selborne had not expressly cited it in the former part of his speech—"call upon the claimant whose vote was objected to to establish his claim, and then he would be entitled to produce any evidence in his power in support of that claim. It has not been at all determined how far that evidence would or would not be the same as the evidence which was produced on the former occasion; or how far it would or would not be open to a future Committee of Privileges to take different views from that which was taken in the year 1875."

The noble and learned Lord concluded as follows, again addressing himself to Lord Redesdale:—"My Lords, I cannot but observe, in conclusion, that I hope my noble friend at the table will take to heart the lesson of these proceedings. It was only this day last week that my noble friend himself asked your Lordships as a deliberative assembly to review various proceedings in the courts of law and elsewhere resulting in a legal judgment found upon an award. He asked for the appointment of a Committee to inquire into that award, and into all the proceedings and all the circumstances connected with it, which had taken place ten years ago, I believe. My

noble friend thought that that was a proper matter, after these judicial determinations, to be brought into debate in your Lordships' House, in which each person would, to use the expression he has just used, 'pick up his information where and how he could.' My Lords, if that is to be done, and if your Lordships are not bound to regard legal determinations of courts of law, you cannot possibly prevent the same rule being applied to the determinations of your Lordships' House; and it appears to me that it is at least as fit a subject for this House to inquire into, whether a proper decision was arrived at in the year 1875 upon the Mar Peerage case, as to enter upon such an inquiry as the noble Earl at the table himself proposed a few days ago."

The Earl of Stair added a few words as follows:—"I feel very anxious that the Roll of the Peers of Scotland should be accepted as it was fixed at the time of the Union. By this proceeding, which we are just now discussing, that Order has been altered; and that will lead, I think, to a great many disputes hereafter. I was present at the last election at Holyrood of Representative Peers for Scotland, and I was one of those who protested. I think that the Protest, which was signed by other noble Lords as well as by myself, ought to have been taken some notice of. When the Earl of Mar's name was called out as it stood upon the Union Roll, it was answered by my noble friend opposite. It seemed a very extraordinary thing to me that he should answer to it, seeing that he only holds a title, according to the Resolution of your Lordships' House, dating from the year 1565. I do think that under the circumstances the Protest signed by myself and other noble Lords also should have been taken more notice of."

Lord Huntly concluded the debate by repeating one of his questions, which the noble and learned Lord, the Lord Chancellor, had not answered,—“I refer to my question as to the Peerage being under attain.” The Lord Chancellor replied that if Lord Huntly would give him notice of the question he would endeavour to answer it. “I answered,” said Lord Cairns, “the two questions of which the noble Lord gave me notice, and I really do not know what the third is.” The discussion then ceased.

The reader will at once perceive that everything in this

debate, interesting as it is throughout, sinks into insignificance in the presence of the statement made by Lord Selborne, under the responsibility of his great learning and authority, as to the conditions under which claims to Scottish dignities come before the House of Lords.

The statement is, in a word, this, that such claims by Statute law—in distinction from the law which regulates claims to English peerages—fall to be investigated and decided upon exclusively by the House of Lords “in the manner which we all know is usual,” and that the decisions pronounced by the House have the force of Statute law.

I venture to think that this statement of the law—absolutely novel and astounding as it is to Scottish ears—must have escaped the distinguished lawyer who has pronounced it through an imperfect appreciation of the fundamental rights of the question. It is expressed with such unhesitating confidence, such crushing severity, that I am compelled to point out that the *dictum* of the noble and learned Lord is purely asseverative, without reference to authority or proof for the facts asserted, and thus the more likely to influence all who, like myself, hold Lord Selborne’s character and authority in respect. Briefly, then, I must protest, first, that, so far as I am aware, there is no statutory authority for the subordination of the right to Scottish peerages to the exclusive jurisdiction of the House of Lords; secondly, that no such subordination could possibly have been carried out by Parliament except in violation of the Treaty of Union, unless upon grounds proved to be for the manifest benefit of the people of Scotland; and, thirdly, that no such subordination can be possibly carried out in the future except under conditions tantamount to a revolution. In a word, I submit a precise negative to Lord Selborne’s general proposition as above set forth. The *rationes* of my dissent are grounded on proofs already given in these pages:—

1. The jurisdiction in claims to Scottish dignities, vested by Statute in the Court of Session, is protected by the terms of the Treaty of Union, and cannot be taken away except by Statute of the Imperial Parliament, proceeding on proof that such deprivation would be of the manifest benefit contemplated by the Act of Union. No side-wind, no partial action by one of the Houses of Parliament, no act even of the Sovereign, can have such effect.

2. The jurisdiction in Scottish dignities, being vested by Statute in the Court of Session, and the Sovereign being precluded, likewise by Statute, from resuming the jurisdiction from the Court, claimants in petitioning the Sovereign for recognition of their rights to dignities seek that recognition, not in the form of a judicial decision, but of an award as from an arbiter, in terms of a tacit but understood compact that the award shall be in terms of the law of Scotland, as elsewhere explained. If that condition of the compact be violated, the original right of resort to the Court of Session is still open, as, according to Lord Chief-Justice Holt, it equally is in the case of claims to English dignities. The Sovereign therefore, possessing no jurisdiction in Scottish peerages, cannot impart or delegate that jurisdiction to the House of Lords; and as the House of Lords has no original jurisdiction, the only statutory jurisdiction in Scottish dignities remains vested in the Court of Session.
3. No Statute has ever been passed depriving the Court of Session of the jurisdiction, or bestowing it on the Sovereign or on the House of Lords. Such a Statute would have the effect of creating a court for adjudicating upon Scottish claims of first and last instance without appeal, such as the advisers of the House of Lords in recent debates affirm the House at this present moment to be, although without the slightest authority for saying so; whereas it has been the pride of the British Themis, both north and south of the Tweed, that no cause can be finally determined without appeal by one and the same Court, or one and the same division of a Court, so as to preclude redress in case of error.
4. The suggestion remains, that Lord Selborne's affirmation may be based upon the Act of 1847, elsewhere discussed,—and an expression in his speech inclines me to think it is so. But if this be the fact, Lord Selborne has fallen into an error more sweeping and grave, but similar in kind to that which the Select Committee fell into in 1877, through overlooking the conditions of the Act. I have shown that the Act only applies to the

case of pretenders to peerages dormant or extinct, or for some time dormant, claiming to vote at the elections at Holyrood; and that the provision for protest by two or more peers for the purpose of bringing the claims of such pretenders to scrutiny before the House of Lords does not apply to the peers of Scotland actually in possession, that is, to the entire peerage, as assumed by Lord Selborne, and most certainly does not profess to subject their rights to the adjudication of the House, irrespectively of the Sovereign and of the usage of petitioning the Crown for awards upon petitions for recognition, to say nothing of the prior and superior rights of the Court of Session. I have already remarked that, from whatever cause, not only is the Act of 1847 omitted in the Appendix to the Report of the Select Committee, but the provisions of the Act are founded upon in the Report of the Committee without any citation of the preamble; and a totally erroneous construction has thus been impressed upon the Statute. I have further shown that the Act itself is deficient in the essentials of constitutional legislation. I know of no other authority for Lord Selborne's affirmation that the House possesses jurisdiction over Scottish peerages by Statute, and that the decisions of the House have the force of Statute law; and, the case being as I have shown, I can see no reason for withholding the expression of my conviction that the whole of that affirmation falls to the ground.

5. Lastly, as proximately affecting the case of Lord Mar, I repeat that, even were the jurisdiction absolutely in the House of Lords by Statute, as stated by Lord Selborne, Lord Mar's right as tenant of the ancient Earldom of Mar has not been legally affected by anything that has taken place in the House of Lords, inasmuch as—1. The House being bound by the repeated acknowledgment of its leading advisers to advise the Crown by Scottish law, and the private rules of the House identified with the memory of Lord Mansfield and Lord Camden, and upon which the Report in favour of Lord Kellie went, being in point-blank opposition to Scottish law, the Resolution of 1875

crumbles into dust, and the Order by which Lord Kellie has been intruded into Lord Mar's seat and right to vote at Holyrood, and which was founded upon the Report in question, sinks to the earth along with it, and remains a lifeless trunk encumbering the ground, and yet exhaling poison from its decaying limbs. And, 2. Even had the House the jurisdiction to its fullest extent, as affirmed by Lord Selborne, it could not have affirmed Lord Kellie's right in usurpation of that of Lord Mar, inasmuch as the entire question has been *res judicata* by the Court of Session since the ruling decret of 1626.

I confess to a difficulty in reconciling Lord Selborne's qualification of the manner of proceeding in Scottish peerage cases, which he affirms to be ordained by Statute law, the jurisdiction vested in the House of Lords, and the decisions having the force of Statutes, as "the manner which we know is usual" to prove Scottish peerage claims, and which Lord Chelmsford so clearly laid down in the Wiltes case in 1862, in words elsewhere quoted—that "usual" course proceeding on petition to the Sovereign, reference to the House for opinion and advice, and final award by the Sovereign. If the procedure were as the noble and learned Lord represents it, why do we petition the Sovereign, and not the House of Lords? The theory is in point-blank opposition to the "usual" procedure, the practice which Lord Selborne assumes to be the working out of that theory.

On the other hand, the distinction drawn by Lord Selborne between claims to Scottish and claims to English dignities, based, as I presume, on the assumption that there is no statutory ascription of the jurisdiction to the House of Lords in English cases—is correct as matter of fact, but in a different sense from that in which Lord Selborne alleges it. Claims to English peerages have always been considered more or less under the jurisdiction of the Sovereign, who never delegated that jurisdiction to the Courts of law, as the Scottish kings did to the Court of Session. According to Lord Selborne's view the peers of Scotland are in a state of comparative degradation, their rights adjudged upon by the House exclusively, while English peerages depend on the supreme judgment of the

Sovereign; whereas this would be a violation of the Treaty of Union, by which Scottish peers are declared to possess all the rights and privileges of English peers and peers of Great Britain, except that of sitting in Parliament. Lord Chief-Justice Holt indeed recognises no such privilege, and indicates protection and redress for English claimants through the courts of law, in the same manner as the law of Scotland does for Scottish claimants through the provisions and in the manner above indicated.

Fortunately, I may here conclude, the views I have thus remonstrated against are those only of Lord Selborne—a host, perhaps, in himself, but which cannot boast of the explicit sanction of the Report of the Select Committee, as adopted by the House of Lords. As previously remarked, the omission of all acknowledgment of the ultimate jurisdiction of the Sovereign throughout the recent debates is very significant, and the unguarded assumption of supreme power by Lord Redesdale and Lord Selborne may well have led the latter noble and learned Lord to the conclusion he has apparently arrived at. But these conclusions—to the effect that claims to Scottish dignities are subordinate to the House of Lords by Statute law, and that the decisions of the House are final and irreversible, and have the force of Statute law, as in the case of Mar—are simply Lord Selborne's opinion, *dicta*, but to be tested by facts and law, and by no means invested with the authority attaching to the *dicta* of Lord Cairns and Lord Selborne himself in the debate upon the Duke of Buccleuch's motion, after those *dicta* had been embodied in the Report of the Select Committee, and that Report had been adopted by the House of Lords.

### SECTION III.

#### *Election of 16th April 1880.*

The last incident in the Mar controversy up to the present time has been the proceedings at the recent general election on the 16th April 1880.

The Lord Clerk Register commenced the proceedings by reverting to the question of protests and counter-protests,

which had been left undetermined at the last election. "It would be in their Lordships' recollection that at the last election he had said that this question would come under the consideration of those who were interested in the preparation of the Minutes of the Peers' elections. It was quite clear that on the one hand to enter the barest possible record that protests had been received from such and such a noble Lord was not sufficient, and that, on the other hand, to write out protests in full, especially protests of very great length and full of historical argument, would, in a very great degree, intercept the Minutes in a form that would be singularly inconvenient. Between these two courses there seemed, however, a third, which they had adopted. The Minutes of the last election, as their Lordships would see, contained not only the fact of certain protests and counter-protests having been made, but also the main substance and purport of them. At the same time care had been taken that all protests should lie on the table; and therefore they were as accessible to every peer as if they had been entered *ad longum* in the Minutes, and not only so, but should they be required for any purpose in the House of Lords, they were at once at hand to be sent up, as well as the actual formal Minutes. On examining the Minutes of last election, it would be seen that it was a mistake to suppose that the protests of certain noble Lords in connection with a special case had not been as fully as possible recorded, and also transmitted to the House of Peers." I am bound to say that I think that, while this full report of Protests in the Minutes of proceedings would be the preferable course in the interest of the public, the intermediate course adopted has the merit of being in accordance with precedents, as for example, in the Minutes of the proceedings of 1726, and other proceedings connected with Protests for precedency. On the summons of the Earl of Mar, Mr. Keir, advocate, presented protests by the Marquess of Huntly, by the Earls of Erroll, Morton, Galloway, and Stair, by Viscount Arbuthnot, and by Lord Blantyre, objecting to the reception of the vote of the Earl of Kellie as Earl of Mar, and protesting that the vote of the heir-general should not be rejected if tendered as Earl of Mar. I myself protested in terms of my two former Protests. This was followed by a Protest by the Earl of Carnwath against the vote of Lord Kellie being accepted

in right of the dignity of Mar, "if such is based on a decision of the Committee of Privileges of the House of Lords in virtue of a creation of 1565—no such creation being recorded, or trace in any way found on the said Roll of Scotch Peers at the time of the Union, nor any power given by the terms of Union to the Sovereign or the House of Lords to add to or to remodel in any way the Roll, as then accepted and ever since acted upon." The Hon. G. Waldegrave-Leslie, husband of the Countess of Rothes in her own right, then protested in objection to the vote of the Earl of Kellie, answering to the Earldom of Mar entered on the Union Roll "as of the year 1457," "inasmuch as the said title of Earl of Mar of 1457 is entered on the said Union Roll immediately before the title of Earl of Rothes of 1457; and also, inasmuch as the said Earl of Mar of 1565, and Earl of Kellie of 1619, does not assume, nor claim, and has never assumed nor claimed, neither is he entitled to assume or claim, the title of the Earldom of Mar of 1457, but has only assumed, and is only entitled to assume, the title of the Earl of Mar of 1565, as awarded to him by a Resolution of the Committee of Privileges of the House of Lords pronounced in the year 1875, and also to the title of the Earl of Kellie of 1619." Lord Napier then protested to the same effect as the noble Lords already mentioned, on the following grounds:—"1. Because it is contrary to reason and precedent that an earldom ruled by the Committee of Privileges in the House of Lords to have been created in the year 1565, should be called and responded to in the order of a more ancient earldom dating from the year 1457; 2. Because the calling of the more recent title in the order of the older one tends to confound the earldom of Mar which has been lately discovered to exist, with the ancient Earldom familiar to the Peerage and history of Scotland; 3. Because the answering of the Earl of Mar and Kellie to the title of Earl of Mar in the old order tends to obscure and prejudice the claim of John Francis Goodeve Erskine to the old Earldom, a claim heretofore recognised in the election of Representative Peers for Scotland, and which it is believed may yet be established before a Committee of Privileges in the House of Lords; 4. Because the answer of the Earl of Mar and Kellie in the order of the older title is derogatory to the dignity and precedence of those Earls whose titles

are antecedent to the date 1565, but whose titles are called after a title bearing that date."

Lord Saltoun then rose, and said—I give his speech, and those that follow, from the report in the *Scotsman* of the 17th April 1880:—"That on the occasion of the last election he protested against a Protest then made by the Earl of Crawford and Balcarres, and he considered it to be again his duty to make a Counter-protest—which he [had] intended to make only against the protest of the Earl of Galloway—against the protests of all the noble Lords, because he had been unaware that there were so many other protests all pointing in the same direction, and most of them couched in exactly the same words as that of the Earl of Galloway. He did not think they were competent to enter upon the reasons and upon the details of a question concerning the Earldom of Mar. There could be no doubt that all these different protests went very much upon the part (point?) of the House of Lords having said that the Earldom of Mar held by the Earl of Kellie was created in 1565. He did not himself think that this was of the slightest importance. What reason the Committee of Privileges of the House of Lords had for saying that the earldom was created in 1565 he did not know. It might be that they intended to express that it was of new creation, or it might be for some other reason; but he did not think there was necessity to inquire into the matter. He did not think it was a thing of the least importance. The fact remained, that, on the 25th February 1875, the highest court in the realm, the court which was the only one which could adjudicate in their Peerage questions, resolved and adjudged that the Right Hon. Walter Henry, the Earl of Kellie, 'hath made out his claim to the honour and dignity of the Earldom of Mar in the Peerage of Scotland'"—the noble Lord omitting the final words, "created in 1565," evidently through considering them, as he had previously stated, of no importance. I do not pause to comment on the identification of the House of Lords in its capacity of a Committee of inquiry selected by the Sovereign for advice in the particular matter of Lord Kellie's Petition, with the House of Lords, as "the highest Court in the realm," invested with positive and constitutional judicial functions which only attach to the House in that character. The inference based upon

this identification will appear immediately. "No person," continued Lord Saltoun, "could suppose that the Earldom of Mar that was there mentioned by the House of Lords" (*i.e.* in the Resolution just quoted) "could be any other Earldom of Mar than that which stood on the Union Roll of Scotland. The plain sense of the Order of the House of Lords" (the Order of the 26th February 1875) "was that the Earl of Kellie be admitted to the Earldom of Mar that stood in (on?) the Union Roll, and be allowed all the privileges connected with it. In that case, these protests directed against the Earl of Mar and Kellie, were directed against the authority of the Queen and the House of Lords, and as such they had no business to receive them. It was not their business, it was not their duty, and it was beyond their privileges; it was *ultra vires* of their authority to discuss the question on that occasion. They were absolutely forbidden to discuss any question of that sort by the terms of the Act of Union; they had met simply for the election of Peers; and they were bound to obey the decrees of the Queen and of the highest Court of the realm." (If Lord Saltoun, I may interpose, had been conversant with the records of the debates of the Peers of Scotland at their meetings at Holyrood in earlier times, such as those of 1721, mentioned some pages back, he could not have spoken thus. At the same time Lord Saltoun was right in the position that the Peers assembled at Holyrood have no call to discuss the merits of protests; their duty, or that rather of the Lord Clerk Register, is to receive them, and record them for future discussion, when their appeal for remedy of law at fitting time and place—that place not being the palace of Holyrood—may be properly entered into before the competent tribunal.) "If," continued Lord Saltoun, "there was another Peerage of Mar"—the reader will perceive the slow but sure progress of truth, creeping like a snail, but steadily towards the mark—"if there was an older Peerage, and if the old territorial Peerage of Mar did not come to an end in 1377, then Mr. Goodeve Erskine could claim that Peerage, and could go before the House of Lords and there establish his claim; and the House of Lords would order this claim to be received, and to be acknowledged. He thought, as he had said, that the protests were founded upon a mistaken idea of what their duties were, and he therefore made a Counter-pro-

test against them." Lord Saltoun concluded by reading a formal Protest embodying the opinions expressed in his speech. I need not repeat what I have elsewhere said, that, while noble Lords are at full liberty to comment on protests, such as those here in question, always within the bounds of courtesy, these protests are not submitted either to them or to the House of Lords, but to the legal tribunal appointed by the law and the constitution for remedy of justice in such cases as those remonstrated against.

Lord Balfour of Burleigh intimated that he adhered to the protest of Lord Saltoun.

The Earl of Galloway then said "that as his name had been brought forward by Lord Saltoun, he hoped he would be allowed to say a few words. He must, first of all, say that he was quite unprepared for this Counter-protest. He would remind their Lordships that upon a recent occasion when assembled in that place some discussion had arisen upon this same case ; and that, after it had been debated from one point of view, the noble Lord at the head of the table" (the Duke of Buccleuch) "had advised them not to discuss the merits of the question at all. On that occasion therefore he had declined to discuss the question, and he entirely agreed with his Lordship on that point, for he did not think that the proper place for such a discussion was that in which they had assembled. He even agreed with Lord Saltoun in thinking that it was *ultra vires* to discuss such a question ; but notwithstanding that, he had again entered into some discussion of the subject. (Hear, hear !) That, he thought, was a very great mistake ; and it was one in which he would not follow the noble Lord. The place for such a question to come up was the House of Lords ; and, as for himself, he certainly intended that it should be discussed there. (Hear, hear!)" The difficulty, I would remark, is that the legal authorities of the House of Lords resist all attempts at discussion by Lord Saltoun's argument of "*Sic volo sic jubeo*," and reprove even Lord Redesdale when he fairly and honestly vindicates the *rationes* of his action. I do not hold that a discussion is *ultra vires* at Holyrood : there is nothing in the Act of Union to prohibit it. The peers have never in practice, at least in later days, considered themselves precluded from discussion, even when attempts were made by the Government to cajole

them or dictate to them. I think, on the other hand, that discussion is inexpedient, and that it is better to leave protests and counter-protests to speak for themselves to the country at the present moment, and to the Supreme Civil Court in the future. Lord Galloway proceeded, "At the same time he must decline to let it go forth undisputed that the question of this Peerage had been brought before the House of Lords as the supremest court in the realm. The case, in fact, had not been brought before the House of Lords as a Court of Appeal—as the highest Court of Appeal. That would have been quite a different thing. The case had merely been adjudicated upon by the Committee of Privileges. He would cite to them the opinion of the present Lord Chancellor (Cairns), as well as that of the late Lord Chancellor (Chelmsford), both of whom had most distinctly stated that the decision in question was not a judgment of the House of Lords, but a mere opinion,"—not, it will be remarked, upon the Mar Resolution specially, but in the case of Resolutions generally, with special bearing on the claim to the honour of Annandale in 1876. Lord Galloway further remarked "that when the Earl of Kellie asked the House of Lords to alter his title, to which this Committee of Privileges found he had a right, as from the year 1565—when he asked that that title should be removed from the old place on the Union Roll, a century or more preceding, the House of Lords declined to do so. On the contrary, they appointed a [Special] Committee, of which Lord Cairns was chairman; and that Committee specially advised the House that there should be no change made upon the Union Roll. He was sorry," he added, "that he had detained them, but he could only say that he protested against Lord Saltoun stating that it was not in the power of the Peers to accept the Protest. (Hear, hear!)"

The Marquess of Lothian agreed with Lord Galloway "that the case was not one to discuss at that time. With reference," he continued, "to what the Earl of Galloway had said—that the question had not been decided by the ultimate Court—that was to say, the House of Lords sitting as a Court of Appeal—he must demur to that statement. The words used in the judgment were 'resolved and adjudged.' How they could go beyond that he could not see." This, of course, was a mere

oversight of the fact that the Sovereign is the judge, and not the House, and that by the acknowledgment of the House itself, the Resolutions on peerage claims, although prefaced by the formal words "resolved and adjudged," are not judgments, but simply opinions submitted as advice to the Sovereign, who is not bound to act upon them, as stated by Lord Chelmsford himself in the Wiltes speech, in accordance with familiar rule and law. Lord Lothian further appears to think, if his words are correctly reported, that the House of Lords acts as a Court of Appeal in Scottish peerage claims. The Marquess of Lothian then proceeded—very much to Lord Galloway's astonishment—to endeavour to make him personally participant in and responsible for the action of the House of Lords. "It was pretty evident," he said, "that the noble Earl was one of those who in the House of Lords had agreed to this Resolution and judgment; and he was now entering a protest against that to which he had assented." "I was not present on the occasion," exclaimed Lord Galloway, "and knew nothing of it." But Lord Lothian "observed that, being a member of the House of Lords, his Lordship was art and part of what had been done." A laugh followed upon Lord Galloway's disclaimer; but whether this attack was a joke (as it might be considered south of the Tweed), or advanced in grim earnest, must remain undetermined. "In reference," continued the noble Marquess, "to what had fallen from Lord Saltoun, he would simply adhere to what had been said, that the Protest be not received. The Act of 1847 was explicit on this point." I confess to having found nothing on the subject on this point; the reader can refer back to it—"and therefore, until the case came before the House of Lords—which it would possibly do, judging from what they had heard" (referring here, I presume, to Lord Galloway's remark) "it was not possible for the Lord Clerk Register to receive the vote of any claimant to the title. He hoped that the Lord Clerk Register would not in future allow such unseemly proceedings as they had witnessed to take place." This final observation, echoed from Lord Redesdale's censure in the House of Lords, reminds one of the wolf that muddled the water, and then complained of the lamb—rather a tough morsel in the present instance.

Lord Galloway then repeated "that he must demur to being told that he had been present on the occasion to which reference had been made. This judgment, or what the Lord Chancellors" (Cairns and Chelmsford) "themselves called an opinion, was given on the 25th February 1875, and was sent down to" the Lord Clerk Register "on the 26th February 1875; and therefore how it was possible for him or any other peer to take part in the question he could not see."

Lord Elphinstone then rose and said that "he had intended to make an appeal to the noble Earl" (the Earl of Galloway) "to withdraw his Protest, but after the intention he had expressed, he (Lord Elphinstone) would not persist in the course he had proposed. It was evident that the noble Lord, and other noble Lords, were not fully aware of the actual effect of the words made use of,"—I presume "resolved and adjudged." "He did not mean to repeat the House of Lords' decision,—he would merely refer to another Court—if he might so call it—that of the Sovereign herself. Some of those present might not be aware that Mr. Goodeve Erskine in 1868 was presented at Court under the style and title of the Earl of Mar. In 1875, however, a letter was sent by the Lord Chamberlain—of which he held a certified copy—notifying to the Earl of Mar and Kellie that, in consequence of the decision of the House of Lords, Mr. Goodeve Erskine's presentation had become null and void. Therefore, here they had the Sovereign herself refusing to recognise Mr. Goodeve Erskine as Earl of Mar." I defer comment till the close of Lord Elphinstone's address. "Another Court, which might be called the Supreme Court of dignities and honours—the College of Arms in London—had also pronounced an opinion on the subject. On the 24th August 1876, Mr. Goodeve Erskine wrote to the Secretary for the Home Department, claiming precedence for his sisters as Earl's daughters. That letter had been referred to the Lyon King-at-Arms, who had replied that there was no ground for entertaining the claim.<sup>1</sup> No further action had been taken on the matter; and therefore they had the decisions of Her

<sup>1</sup> Lord Elphinstone must have been misinformed as to the opinion expressed by Lyon, which was exactly to the opposite effect. See *supra*, Letter I. vol. i. p. 13.

Majesty and the College of Arms in addition to that of the House of Lords, refusing to recognise the claim to the Earldom. He thought that the noble Earl" (Lord Galloway) "should really have taken this matter into consideration before signing his Protest." It does not appear from the report that any "hear, hear!" or audible expression of feeling betrayed the sentiments of the noble Lords who listened to the allegations and arguments thus set forth. Anything more calculated to create an unfavourable impression beyond the audience to which they were addressed cannot be imagined, and I shall therefore interrupt the narrative of the discussion by a comment for which, however full, I will not offer an apology. In the first place, neither the House of Lords, the College of Arms in London, the Lyon Office in Edinburgh, nor the Sovereign himself, is a competent Court in a question of dignity where there has not only been no claim to the dignity, but the tenant of the dignity whose right is objected to, as in the case of Lord Mar, has succeeded *jure sanguinis* by the law of Scotland to his predecessor in the dignity, and has no call to establish his right before the House of Lords or any other tribunal. What the College of Arms in London has to do with a Scottish peerage I am at a loss to conceive; and, although the Lyon Office in Edinburgh would be a far more suitable tribunal than the House of Lords, and the opinion of the Lord Lyon, judicially pronounced on legal reference, must always carry great weight, the office has never been intrusted with the decision upon claims to dignities; and if such were referred to it, there would be an appeal to the Court of Session. Under such circumstances I should prefer resorting to the fountain-head. The argument from the action of the Lord Chamberlain in cancelling Lord Mar's presentation at Court, as testified by an autograph letter addressed, as we are informed—a very singular circumstance—to Lord Kellie, cannot be considered, as Lord Elphinstone considers it, of a judicial character; nor can Her Majesty's name and authority be appealed to as founded upon action taken by that functionary. The Sovereign (I prefer this abstract or impersonal designation) only acts as arbiter or quasi-judge in a Scottish peerage-claim when it is brought before him by petition, the claimant selecting that process of

recognition preferably to the legal course before the Court of Session. But the Sovereign has no power of interference in regard to dignities of which the tenant is in possession by law—which is Lord Mar's case. While, moreover, the reception at Court was in due course after Lord Mar's accession to his uncle's earldom, it is obvious that the cancellation of that reception took place—it would appear from the Lord Chamberlain's letter—at the instance of Lord Kellie—under the impression generally entertained till the debate on the Duke of Buccleuch's Resolution that the Resolution of the 25th February 1875 declared the original earldom extinct at the same time that it recognised the new earldom stated to have been conferred in 1565. The House of Lords have since repudiated that construction, that impression; and the cancellation in question, which proceeded upon that construction and impression, must now be admitted to have been a hasty and imprudent step, which ought to be retraced, precisely as the Order of the 26th February 1875, proceeding on the same erroneous basis, ought to be rescinded. Lord Elphinstone's argument for the cancellation is therefore built upon a foundation of sand.<sup>1</sup> The same observations apply to the refusal of the rank of Earl's daughters to Lord Mar's sisters—at least in principle; for it is in the option of the Sovereign to concede such rank or to withhold it at his pleasure. It is usually conceded in such cases of succession; and the refusal can only be imputed under the circumstances to the same misapprehension which induced the cancellation. It will be remembered that, but for the private rules of the House of Lords which that House has now virtually abjured as void of legislative sanction, the Scottish law of succession would have been respected, and "Mr. Goodeve Erskine" recognised without a dissenting voice as Earl of Mar, notwithstanding any claim that Lord Kellie might have made to a modern Earldom of Mar. Such being the case, nothing but gross demerit would have justified the

<sup>1</sup> To bring in the Queen's name in respect to the act of her Lord Chamberlain appears to me the reverse of decorous. It should be added that Lord Kellie's request was not acceded to to the extent of formally cancelling the presentation through the *Gazette*, the only way in which a presentation once made can be validly cancelled. See Letter I. vol. i. p. 13.

action of the Court official in cancelling Lord Mar's presentation under sanction of the Sovereign; and the perpetration of that exclusion is thus as severe and unjust a social stigma as the refusal to accept his vote as Earl of Mar is an unjust and unconstitutional political wrong.

The Duke of Buccleuch wound up the discussion by a few words, as follows:—"He should not," he said, "have spoken, but for the extraordinary statement that had been made by his friend" (the Earl of Galloway) "to the effect that this decision of the House of Lords was merely an opinion, and not a judgment. Any one who knew anything of business matters knew that when such a claim was made and referred to the House of Lords, that body, in order to the due despatch of business, remitted the matter to the Committee of Privileges. That Committee was an open one; the only restriction, indeed, placed upon it was that there should be a *minimum* of fifteen members present before it could proceed to business. Besides, noble Lords learned in the law were always called upon to attend its decisions. They heard counsel, and, if he recollected aright, on this particular occasion the case lasted a very considerable time, so that if his noble friend had wished it, he could have sat through the whole of the weary hours the Committee had spent upon the case. The Committee, however, presented to the House of Lords what they considered to be their opinion on the case; and the House, agreeing with that opinion, ordered and adjudicated thereon. Now, his friend had left out the word 'adjudged.' (Hear, hear!) It ordered the Clerk of Parliaments to transmit to the Lord Clerk Register of Scotland such Resolution and judgment. He only said this because there seemed to be a misunderstanding as to what really did take place." I have no wish to prolong this report by dwelling on the noble Duke's description of the Committees for Privileges and such minor matters; but this I must repeat, that the words "resolved and adjudged" are merely formal in the presence of the higher and controlling obligation which compels us to recognise the "Resolutions" of the Committee adopted by the House as mere opinions, not judgments, reported to the Sovereign for his consideration and independent action, as by the testimony of Lord Chelmsford in the Wiltes

case, and of Lord Chelmsford and Lord Cairns in the Annandale, to call no further witnesses ; and, further, that the question is not, whether the House ordered the Clerk of the Parliaments to transmit the Resolution and the Order of the 26th February 1875 to the Lord Clerk Register, which is a mere matter of fact, but whether what took place was legal or illegal, within or beyond the power of the House of Lords, acting thus when *functus officio*, independently of, and before the approval of the Sovereign. The “misunderstanding” remarked upon by the Duke of Buccleuch was not on the side of Lord Galloway or Lord Mar’s other friends. The noble Duke ended, I am happy to add, with his natural consideration for justice :—“ If the ancient Earldom of Mar still existed, and could be proved to exist, no person would be more glad than he himself of the circumstance ; but they all knew that this was not the only case of an ancient peerage which had continued to the present day, both in England and Scotland, in which the same title existed, but where the original peerage did not exist. At all events, the present claim had been decided by the House of Lords, and they (the Peers) could not decide or hear it ; and they should only be wasting their time by further discussing the matter. He hoped, therefore, that they would now proceed to the business which had called them together.”

The Lord Clerk Register then said “that the answer he had to give was that the vote of the Earl of Mar and Kellie would be received in accordance with the terms of the instructions from the House of Lords,”—that is, of the Order of the 26th February 1875, still hovering like a phantom, although a very substantial one, over the grave of the misconception, viz., that the Resolution declared the original earldom to be extinct, which the House of Lords itself repudiated in the debate upon the Duke of Buccleuch’s Resolution, and subsequently. “ The protests,” the Lord Clerk Register added, “ would be received and treated in the manner he had described.”

The proceedings then terminated so far as the Mar case was concerned.

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I need not, I think, make any further remarks upon the incidents which form the subject of the three sections of this Letter. They may have tended to assist the development of public opinion; but, as I before observed, no change has taken place in the broad features of the case as between Lord Mar and the House of Lords. I have only to note with gratification the accession of Lord Galloway and Lord Blantyre to the side of those who struggle for the maintenance of the law of Scotland and the inviolability of the Treaty of Union, as bound up with the rights of Lord Mar and the integrity and security of the Peerage of Scotland, as against the modern innovations and the unauthorised and now practically repudiated doctrines of the House of Lords since 1762 and 1771, on which more than one ancient Scottish peerage has made shipwreck, while others have only escaped it by a miracle.

I may enumerate, in conclusion, the Scottish Peers who, on broader or narrower grounds, have protested in the interests of justice for remedy of law, at fitting time and place, against the Resolution of the House of Lords and the Order addressed by the House to the Lord Clerk Register of the 26th February 1875, since the fulmination of the latter mandate—if indeed the word can be applied to what is in law but a *brutum fulmen*, however effective for the moment in the triumph of illegality. Their names are as follows, given in the order of the Union Roll:—The Marquess of Huntly; the Earls of Crawford, Erroll, Rothes (as by the Hon. George Waldegrave-Leslie, husband of the Countess of Rothes in her own right), Morton, Cassillis (Marquess of Ailsa), Caithness, Galloway, Carnwath, and Stair; the Viscounts Stormont (Earl of Mansfield) and Arbuthnot; and Lords Strathallan, Blantyre, and Napier—as against Lords Saltoun and Balfour of Burleigh, counter-protesters, supported by the verbal advocacy at Holyrood of the Duke of Buccleuch, the Marquess of Lothian, and Lord Elphinstone. I have no knowledge of the views of the other Scottish Peers; but I look for many adhesions yet to follow. Meanwhile, the fifteen Peers above specified—as balanced by the counter-protests of Lords Saltoun and Balfour of Burleigh—constitute a phalanx, small indeed, but strong in the assertion of legal right and in the invincibility of truth, which

the hosts of Darius cannot look upon with indifference or unconcern.<sup>1</sup>

<sup>1</sup> In the indication given in the closing section of Letter I. of the subjects to be taken up, it is said that this sixteenth Letter is to deal with "the latest incidents in the controversy, including the rescission of the obnoxious Order of 1875 by the House of Lords in (June) 1880." The absence of any allusion to any event later than April 1880 is accounted for by the fact that the introductory Letter had those finishing touches of the author which the later part of the work did not receive. In the Appendix No. v. will be found, reprinted from *Hansard*, the debate of 14th June 1880, in which Lord Galloway's Resolution, here referred to, was carried ; and also the debate of 21st June 1880, where it will be seen that that Resolution failed of effect, through a technical oversight, and the step which had been taken in a right direction was again retraced.

## LETTER XVII.

## CHARGES AGAINST MYSELF.

I PAUSE at this point—between the latest scenes in the drama as exhibited in the preceding Letter, and the consideration of what may be the remedy for the injustice to which Lord Mar and the Peers of Scotland are at present subjected—for the purpose of completing my personal vindication against the charges which, it may be remembered, were advanced in Lord Kellic's Address against my competency to intervene by protest in this matter, and my consistency and impartiality in such intervention. In noticing these charges in the opening Letter of this series, I distinguished them as resolving into two categories. The first of these categories imputed blame to me for protesting and for endeavouring to induce other Peers to protest against the interests of justice—suggested distrust of my guidance as an “amateur lawyer”—and charged me with holding the decisions of the House of Lords in contempt. I answered these imputations in the course of that opening Letter. They did not appear to me of a very grievous character. But the second category included charges of a graver complexion—that, viz., of inconsistency in argument as suited the interest of the moment, and of prejudice and partiality rendering me unfit to be trusted in this matter, because I myself stand in the position of an unsuccessful and disappointed claimant of a Scottish dignity before the House of Lords, and have expressed myself strongly against the justice of their decision—the inference from which is that my interference by protest on behalf of Lord Mar is to be viewed with correspondent suspicion. I felt that these latter imputations were of a serious nature, and could not be dealt with like the former; and I therefore reserved my response to them for that

moment in the future when the full vindication of my two Protests, by the evidence and proof which I was prepared to produce in support of their several *rationes*, shall have provided the materials for such response, and enabled me to meet the charges with brevity and point, and not less to Lord Mar's advantage (so far as my Protests may have done good service) than to my sense of what is due to myself. That moment has now arrived, and I will endeavour to fulfil my engagement with candour and temper; and I hope to disperse any lingering prejudice which may attach in the mind of the reader either to the merits of my argument or to my own character for fair dealing and honesty.

A writer generally persuades himself that he has some claim on the continuous attention of his reader; but if this be conceded to me by any friendly critic in the present instance, I may requite the concession by absolving him from the obligation of reading any more of the ensuing Letter, provided only he credit myself and the argument he has toiled through in the preceding pages with the reverse of the discredit which I have in these pages endeavoured to dissipate. He can thus pass at once to the next and concluding Letter of the series.

1. Lord Kellie's charge of inconsistency in argument, as circumstances vary, is expressed as follows—and it will be seen that various statements are intermixed which require distinct rectification:—"An action was brought in 1706 by the Earl of Sutherland to reduce the precedency given to the Earl of Crawford over his dignity; and, in defending that action, Lord Crawford's ancestor argued strongly in favour of the presumption of male descent in peerages, and the judgment of the Court of Session was in favour of his argument, and in direct contradiction to the present Lord Crawford's contention that the rule and presumption is in favour of heirs-general. He, in his own person, furnishes a proof of his inconsistency. In theory he is in favour of female succession, but in practice he excludes them for males in his own earldom and barony; and in the Montrose case he wished to construe a remainder 'hæredibus suis' in favour of heirs-male." Lord Kellie further adds, that "Lord Crawford's startling statement in his Additional Protest, that a 'Resolution of the Committee for Privi-

leges, although confirmed by the House of Lords and approved by Her Majesty, is inoperative, and must be held null and void,' together with the general contempt with which he treats decisions of the House, would actually lead to the supposition that his own dignity depended on the authority of some much higher tribunal. It is, however, a fact that he holds his peerage of Crawford in virtue of a decision of that House, and in virtue of that alone; and that the judgment in the Crawford case in 1848 was in direct opposition to the law as laid down by the Court of Session in the Oliphant case, part of the judgment in which case Lord Crawford has quoted for another purpose. There is no patent of the ancient peerage of Crawford in existence; and that dignity was held to the exclusion of heirs-female, from its creation in 1398 till it was inherited by Ludovic Earl of Crawford in the reign of King Charles I. It is not my intention to controvert Lord Crawford's right to his dignity, or to criticise the decision of the House of Lords in that case, when his father claimed it after it had been dormant for forty years. It is, however, fortunate for Lord Crawford that a tribunal exists which has authority to decide peerage cases, and which does not consider the law laid down by the Court of Session infallible." My reply is this:—

- i. That even were the Lord Crawford of 1706 my ancestor, which he was not—but the representative of the younger and interpolated house of the Lords Lindsay of the Byres, which became extinct in the direct line in 1808—I cannot see how his having founded on a plea in law which I denounce as unfounded can infer inconsistency in myself. This is the most extraordinary view of the transmissibility of hereditary responsibility which I ever heard of. The then Earl of Crawford and Lindsay undoubtedly urged the heterodox doctrine, founded on the Lombard law, in favour of the exclusive right of the heir-male, in order to prove that Elizabeth, the Sutherland heiress in 1514, was not Countess of Sutherland in her own right, and that her husband Adam Gordon, who figures as Earl of Sutherland afterwards, must have been created so by a lost patent, the presumption in regard to which must have been in favour of heirs-male of the body,—Crawford's inference being, on this

particular point of his argument, that the Sutherland creation must be referred to 1514, and that he was therefore entitled to the precedency awarded to him by the Decreet of Ranking of 1606. The rule and presumption thus founded on by Crawford was precisely that affirmed by Lords Hardwicke and Mansfield in the Cassillis claim in 1762, "anxiously adhered to," as Lord Loughborough said in 1797, "ever since," and upon which the House of Lords have grounded their opinion, or "decision," in Lord Kellie's favour recently. But although the Court of Session delivered their interlocutor in Crawford's favour, sustaining his defence both on the argument above stated and on the ground of prescriptive right, their determination was not (as Lord Mansfield imagined and stated in 1762, and as Lord Kellie affirms *supra*) a "judgment" in the sense of a final judgment, upon which "extract" proceeded, but was expressly worded so as to leave the cause liable to be re-opened by Sutherland at his pleasure—as Sutherland actually did in 1746, as already stated. That the Lords of Session in 1706 fully recognised the abstract law of succession as asserted throughout these present Letters, and as specially laid down by the Oliphant decision in 1633, is clear from the judgment in the Lovat case, in absence of the heir-male, and thus not final, which proceeded on the ordinary rule and presumption of law in favour of the heir-female, in 1702, only four years previously. The Lords subsequently, *partibus comparentibus*, recognised the right of the heir-male, Simon Lord Lovat, on the exception to the normal rule and presumption, in 1730, as elsewhere shown.

- ii. But, while repudiating all responsibility for the pleadings of 1706, so far as Crawford's plea for the exclusive preference of heirs-male is concerned, I admit that were it true that I, or my father, had maintained in 1848 that the Earldom of Crawford and Lordship of Lindsay *per excellentiam* were descendible to heirs-male exclusively (and necessarily, or Lord Kellie's allegation is devoid of point, on the above presumption in favour of such heirs), while, at the same time, I urged in 1875 and

since, that by the Oliphant decision of 1633 and the law of Scotland, the presumption is in favour of heirs-general, and thus in favour of the Earl of Mar—then Lord Kellie would establish a very grave imputation of wilful inconsistency against me. But Lord Kellie entirely overlooks the exception in favour of heirs-male, reserved by the Oliphant decision and by the law of Scotland against the general rule and presumption in favour of heirs-general, when a provision in favour of heirs-male can be established, and which I have sufficiently proved by testimony in the second Letter *supra*. That the Earldom of Crawford and Lordship of Lindsay fell under that exception is established not only by the fact that they both repeatedly passed over the lineal heir-female to pass to the collateral heir-male, but by the fact that the investitures of the house of Crawford *i.e.* the entails of the property which descended with the dignities, were exclusively to heirs-male whatsoever—a consideration of great weight in Scottish law, and upon which, as I have shown elsewhere, the final decision in the Lovat case in 1730 proceeded. In absolute contrast to Crawford, the Earldom of Sutherland has descended throughout under the abstract rule and presumption affirmed by the Oliphant decision to heirs-general; so has the Earldom of Mar under the same rule, or rather law of succession,—there is no difference so far between the two cases. But whenever the lineal heirship devolved (as it did over and over again) on a female in the Crawford case, the exception asserted itself against the presumption in favour of the heir-general, as recognised by the saving words in the Oliphant decision, and by the usual tenor of the law, to which those words gave expression. It is clear, therefore, that Lord Kellie's words—"he (Lord Crawford) in his own person furnishes a proof of his inconsistency; in theory he is in favour of female succession, but in practice" it is different,—have no venom in their sting,—the English of the suggestion being that I blow hot and cold as it suits my purpose, and am precluded from denying Lord Kellie's right because I vindicate my own on the contrary

contention. I have been perfectly consistent from beginning to end.

- iii. From what I have above shown, Lord Kellie is equally in error in representing the House of Lords as having “decided in favour of my father in the Crawford claim” in direct opposition to the law as laid down in the Oliphant case;—their report was fully justified by the exception to the general rule therein expressed—of which Lord Kellie, it will be observed, takes no notice whatever—but which exception *per contra* has not been established by Lord Kellie in regard to the Earldom of Mar.
- iv. Still less is Lord Kellie justified in inferring and founding upon the inference that the House of Lords “does not consider the law laid down by the Court of Session,” *i.e.* in the Oliphant case, “infallible,” or they would not have reported in the Crawford case as they did, that report being “in direct opposition to the law” as so laid down. Lord Kellie in this observation pronounces the strongest possible condemnation of the House of Lords that words can convey, in the assertion that they considered themselves at liberty to disregard the law of the land as laid down in a solemn and final judgment of the Court of Session, acted upon too by the King subsequently, and to decide the Crawford case in opposition to it. They did no such thing in that particular case, although they did so in the Cassillis and many subsequent claims. It is not I, but Lord Kellie, that thus necessarily, from the point of Scottish law, attacks the House of Lords. On the other hand, if in the recent Mar case the House, following the tradition of 1762, did, as in 1771 and 1797, disregard the law laid down in the Oliphant case, inverting the rule and presumption of law in favour of the heir-male and against the heir-general, and throwing the burden of proof on the latter; and if they similarly overruled the final judgment pronounced on the merits of the Mar case by the Court of Session in 1626, then, according to Lord Kellie, they did not in 1875 “consider the law laid down by the Court of Session infallible,” as they were bound to do by the

repeated acknowledgment of the obligation incumbent upon them to report according to the law of Scotland, and under the provisions of the Treaty of Union. There is no such great difference, it seems, between Lord Kellie and myself as to the fact that the House of Lords consider themselves at liberty to overrule and set aside the final Decrees of the Court of Session. I do not think he has benefited his own case by this admission.

- v. There is yet one further instance alleged by Lord Kellie in support of his charge of inconsistency,—it is, that “in the Montrose case” I “wished to construe a remainder ‘*hæredibus suis*’ in favour of heirs-male.” Such words as “wish” and “desire” (remarked on in a former page) import a personal element into a purely legal discussion, which (as in the former case) I merely notice in order to dismiss. My reply is, that there is no inconsistency imputable to me in the respect alleged. The limitation of the Dukedom of Montrose created in 1488 was to the grantee, the Earl of Crawford, “*et hæredibus suis*.” So was that of the Earldom of Glencairn, created ten days after the Dukedom. If there is one principle more familiar than another in Scottish law, it is that “heirs” is a flexible term, governable by attendant circumstances. Erskine’s authority may suffice here:—“Though by the word ‘heirs’ in the most proper signification, the heir-at-law is understood, it is certain that that general term has not always one fixed signification, but varies according to the nature of the subject, or of the security, or other circumstances.” The “heirs” of the house of Crawford referred to in the Montrose charter of 1488—heirs alike to the dignities and fiefs—were the heirs under the investitures, viz., heirs-male whatsoever, in total exclusion of females. To give a recent illustration of the principle,—a litigation having arisen regarding the Crawford succession in 1748 and afterwards, when John the twentieth Earl of Crawford (known as the “gallant earl”) had in that year granted a trust-bond of his landed property to Mr. George Ross, by the terms of which the latter became bound eventually to denude in favour of

the said Earl John and his “ heirs ” simply—it became a question, on the death of Earl John without issue, whether the benefit of this obligation devolved to Lady Mary Lindsay (by marriage Campbell), his sister and heir of line, or to George, fourth Viscount Garnock, his distant collateral heir-male, who thereupon became twenty-first Earl of Crawford ; and it was decided, after long litigation before the Court of Session, on the 28th January 1791, that the term “ heirs ” could only mean heirs-male, inasmuch as the estates, by the last regulating Crawford settlement and investitures in 1648 and 1670, stood in the person of the above Earl John to heirs-male, including the said Earl George—under which character he, Earl George, accordingly succeeded to them. The operation of the same rule is constantly illustrated in the Crawford family in the case of “ nova feoda ” granted to the Earls before and after the grant of the Dukedom with the limitation “ hæredibus suis,” which passed over the heirs-female, as a matter of course, to vest in the heirs under the standing investiture, viz., heirs-male whatsoever. By the terms of the charter of the Dukedom itself, it was not an ordinary creation, but a transmutation of the title of Earl into that of Duke, on the ground that whereas the Earls of Crawford had hitherto enjoyed the family fiefs “ titulo comitatus,” it was the King’s pleasure that they should hold them henceforward by their higher title of duke—“ duces appellari.” Part of the very property granted with the dukedom (according to time-honoured usage) for its special support, and included under the general limitation “ hæredibus suis,” was actually held by the Duke under previous investitures, especially the great Crawford entail of 1421, to heirs-male whatsoever ; and this part—consisting of an annual revenue of forty marks out of the great customs of Montrose—was not resigned previously to the charter of the Dukedom, so as to enable the King to alter the destination. According to Lord Kellie’s criticism, this would have descended, along with the entire Crawford patrimony, converted into a dukedom, and with the additional fiefs conferred by the charter, to “ hæredibus,”

or “heirs-female.” But Erskine once more has explained the principle which took effect in this Montrose case:—“In every case where there has been an antecedent destination of a subject, limiting the succession to a particular order of heirs, the word ‘heir’ or ‘heir whatsoever’ in all posterior settlements of that subject must be understood, not of the heirs-at-law, but of the heir of the former investiture.” Hence, the forty marks from the Montrose customs being limited to heirs-male in the entail of 1421, the flexible term “heirs” in the subsequent Montrose conveyance must denote heirs-male, so far as the forty marks included in the general grant of the Montrose customs are concerned—the said forty marks, as premised, not having been resigned. On the contrary view, the Crown would have granted away to the heirs of line what stood already granted to the heir-male—which would have been unjust in the first instance, and *ultra vires* of the Crown in the second, from the complete want of a resignation. I could add more, but this is enough surely, on this Montrose subject. Again, when the direct representation of the Earls of Glencairn ended in an heiress in 1670, the earldom passed over her at once to the heir-male collateral under the limitation “*hæredibus suis*” in the Glencairn charter of creation in 1488—identical, as stated, with that in the Montrose case. The investitures of the house of Kilmaurs or Glencairn, like those of Crawford, had been in favour of heirs-male whatsoever ever since the fourteenth century. The House of Lords pronounced no opinion (as might be inferred from Lord Kellie’s statement) on the interpretation of the limitation “*hæredibus*” in the Montrose charter, inasmuch as they dismissed the claim before coming to the question of inheritance, merely on the ground that the dukedom had been cut down, like that of Glencairn, by the Act Rescissory of 1488, in overruling of the final judgment of the Court of Session in 1648, to the effect that the Act had had no such effect upon the earldom, which the Lords admitted stood in precisely the same category as the dukedom, so far.

vi. There is thus nothing inconsistent between my recent

protestation in favour of Lord Mar's right under the rule and presumption as laid down by the Oliphant decision, and the advocacy by my father and myself of our rights to the Crawford and Montrose dignities under the exception to that law, likewise therein recognised and laid down. I do not mean to say that the Oliphant decision was brought into discussion on either of these occasions; but the argument was based throughout on the proof that the heir-male had invariably been preferred by the House of Crawford to the heir-general and it was not necessary to go beyond that proof in the argument submitted to the House of Lords under reference from the Queen on either the one occasion or the other.

vii. It is hardly worth noticing Lord Kellie's words, that I have "quoted part of the judgment in" the Oliphant case "for another purpose." I do so merely to state that the other interlocutors in the Oliphant judgment had no reference whatever to the general law of succession, inclusive of rule and exception, but to matters special to the particular case then before the Court. There is nothing further, I think, calling for special remark, under the present head of criticism.

2. I come now to the more important charge on the part of Lord Kellie, to the effect that any intervention on my part on behalf of Lord Mar, as expressed in my two Protests, or, indeed, in any such matters, must be viewed with suspicion, as proceeding from a partial and interested advocate, animated by hostility to the House of Lords, as being myself a "disappointed" claimant. Lord Kellie's words are as follows:—"Besides, I venture to doubt whether Lord Crawford can be considered an impartial judge in such matters, seeing that it is not the first time that he has thought proper to impugn a judgment of the House of Lords. In 1850 the late Earl of Crawford claimed a Dukedom of Montrose. The claim, however, was unanimously rejected by a Committee for Privileges, including Lords Lyndhurst, Brougham, St. Leonards, Cranworth, and Redesdale. Lord Crawford, then Lord Lindsay, was disappointed with this judgment, and wrote an Address to the Queen, in which he used the following language,"—words

which I prefer to lay before the reader in connection with the context in which they occur, but which I will give in italics :—“This, my Lords,” concludes Lord Kellie, “being Lord Crawford’s opinion in a former case, it is not so surprising that he should again repudiate the authority of that tribunal and declare that ‘their Resolution, although confirmed by the Peers and approved of by the Sovereign, is inoperative, and must be held null and void,’”—this declaration being on the ground, I may add, that “there is not the slightest evidence by writ or other competent proof that a new Peerage of Mar”—that of 1565—“was ever created,” etc., as in the seventh *ratio* of my Additional Protest.

The passage in my Address to the Queen, in which the words quoted against me by Lord Kellie occur, are as follows :—“I trust that your Majesty will give me credit for an anxious desire not to say one syllable more than may be necessary in order to possess your Majesty with the grounds and reasons upon which I venture to hope that your Majesty, as the ultimate resort, and as foreseeing the consequences which must inevitably follow from such a step, will pause before you deliberately sanction the Resolution now submitted to you. That, on the one hand, I believe that *fact has been misapprehended, evidence misrepresented, law misunderstood and misapplied, precedent disregarded, and unjust and inconsistent measure liberally dealt out, by the Committee to which my father’s claim has been submitted by your Majesty—every point in his argument being either misconstrued, treated with contempt, or overlooked*; and that, on the other hand, every hint or suggestion thrown out by the officers of the Crown or by his Grace of Montrose has been eagerly picked up, assimilated, and reproduced, to the prejudice of the claimant, in the speeches which ushered in the Resolution; while in more than one instance the characteristic fearlessness of a noble and learned Lord has outstripped even the bounds of modesty within which your Majesty’s learned officers restrained themselves, and has ventured assertions and propositions which I maintain to be pregnant with error, and utterly untenable in point of legal

fact and truth—that I believe this to be the case, I cannot and will not deny ; and I affirm moreover, as the result of close observation during the course of the inquiry, that, *speaking generally, this claim has been throughout thought lightly of, vilipended, and held cheap*, especially by the noble and learned Lord to whom I have just alluded. But nevertheless, Madam, far from being willing to impute wilful blindness or perversion to the noble and learned Lords who have honoured this claim with their consideration, I feel most sincerely anxious to attribute—and I am inclined to think that I may with truth and justice fairly attribute—the Opinion to which they have come, and by which I contend that the interests of my family have been (thus far) sacrificed, not to any even indirect moral obliquity, but to haste, precipitancy, ignorance (perhaps not to be wondered at) of the feudal and peerage law, more especially of Scotland, which they behoved to administer—to light esteem, if not disrespect, for the Supreme Civil Court of Scotland, whether as regards its functional authority, its wisdom, or its judicial integrity in past times—to an oblivion of the great law of priority of obligation, by which antecedents govern—and to a bias against the present claim, which I believe to have been partly of unconscious growth, and partly grounded on the erroneous views with respect to peerages generally which I have already adverted to. I feel assured, in short, that if the subject of the late decision had lain within any of the peculiar fields in which the native genius, the acquired learning, and the large experience of the noble and learned Lords who have pronounced this opinion have on so many past occasions been ably and gracefully exercised, the result would have been very different. And, if I have ventured to question the result actually arrived at, I may say with truth that it has been in vindication and defence of ancient and acknowledged law, of the competence and character of the Supreme Civil Court of my native country, of Royal faith, of your Majesty's prerogative, and of national honour—all of which were, and are, involved, under the peculiar circumstances of

this case, in the recognition and maintenance of the dignity now claimed by my father."

I grieve that this question of the Montrose claim should have been introduced in this particular way into the discussion between myself and Lord Kellie. But as the words quoted from the above passage have been made the fulcrum of an attempt to exclude my voice from consideration in the Mar case, as that of a "disappointed" and discredited claimant, animated (as must be inferred) by hostility to the House of Lords, I have no choice but to notice Lord Kellie's observations, not only in vindication of my efforts on behalf of Lord Mar, but of my own character and of the right of my family to the ancient Dukedom in question, which it is assumed are extinguished by the so-called "judgment" of the House of Lords in 1853.

I do not quarrel with the word "disappointed." Every one is disappointed who fails in an object he has set before him; but when he is foiled, not by the administration of law, but by overruling of law, on the part of those in high places, disappointment is scarcely thought of under the stronger sentiment of indignation.

The words Lord Kellie has quoted are strong; but I would ask, first, Is it to be presumed that I, a man of mature years at the time when I wrote them, and addressing the remonstrance to the Sovereign, would use such without weighing their force and accuracy? Be that as it may, the main question is, Were the words true? If the words were not justified by proof, no apology or retraction could be too absolute; and no false pride would have hindered me from withdrawing them. But if justified, the lapse of nearly a quarter of a century cannot diminish their potency or their weight. From the manner in which Lord Kellie quotes them, it might be supposed that the Address in which they occur had been an ordinary and quasi-private petition. But that Address was prefixed to my Report of the Montrose claim—an elaborate Report, not privately circulated, but published and advertised through the leading publishers of London in 1855, in which I gave a full

analysis of the argument as between my father and the Crown, assisted and in fact inspired by the late Duke of Montrose under very abnormal circumstances—the speeches of counsel on both sides *verbatim*, the speeches of the law Lords, and the Minutes of Evidence; together with various dissertations upon particular points of the law and jurisdiction affecting peerages which I considered essential to the full comprehension of the claim and the Report of the Committee. To insure the fullest publicity, I drew attention to the Report and the merits of the case in a letter to the *Times* of the 19th November 1855. The publication was a matter of notoriety. Nothing in the Address prefixed, or in the analysis of the pleadings of counsel, or in the commentary I subjoined to the speeches of the noble and learned Lords who addressed the Committee, was alleged without reference to proof—every clause between every comma in the passage quoted from by Lord Kellie was thus vindicated. And I venture to submit that, however strong, the language I used was temperate, and unaccompanied by the slightest imputation upon the legal honour of those whose “judgment” I remonstrated against. No one has ever questioned the accuracy and fairness of that Report from the day of its publication in 1855 till now. The question, after all, remains, as in this present case of Mar—Did the Lords report on the Montrose claim in accordance with the law of Scotland and the final judgment of the Court of Session in 1648—both of which were binding on the House, or in contradiction to that law and in overruling of that judgment? I cannot, of course, go further into the merits; but I appeal to my Report in full confidence that it will bear out my affirmation that the noble and learned Lords advised the Committee according to the latter of these two alternatives.

But I have a word or two more to add on matters of detail in this necessary vindication. Lord Kellie represents the Committee for Privileges which reported on the Montrose claim as including “Lords Lyndhurst, Brougham, St. Leonards, Cranworth, and Redesdale,”

who “unanimously rejected” the claim. The only peers who addressed the Committee for Privileges were Lord St. Leonards and Lord Cranworth. Lord Brougham, who had been absent during the greater part of the claimant’s reply to the objections of the Crown, authorised Lord St. Leonards to express his entire concurrence with the Resolution which had been prepared for proposition to the Committee. Lord Lyndhurst limited his concurrence to the effect attributed to the Act Rescissory of 1488, which he considered to have annulled the grant of the Dukedom, refraining from the expression of any opinion on the other pleas independent of the Glencairn decision of 1648 which the claimant had advanced, but to which, owing to non-attendance, he had not been able to pay attention. Lord Redesdale, then as now Chairman of Committees, and who is not a law Lord, did not speak; and Lord Kellie is in error in including his voice in the “unanimous rejection” of the claim. On the contrary, as Chairman of Committees, Lord Redesdale did his utmost—for which I have ever been grateful to him—to obtain a fair consideration of the argument by which the claimant showed that the Act Rescissory neither had nor could have any effect upon the dignity, and that the Court of Session in 1648 decided that it had not had any in the case of Glencairn. “The Court of Session,” he said, “found that there was nothing in the Act Rescissory to prevent his” (Glencairn’s) “assuming the title,”—“whether they were right or wrong, they accepted the patent of 1488.” I brought Lord Redesdale’s observations together in a summary of the speeches in my Report with this remark:—“The preceding *dicta* of Lord Redesdale are stated here merely as impressions expressed in the course of the argument as the subjects successively passed before the Committee. It does not therefore by any means follow that the noble chairman adhered to those impressions at the period when the Resolution was moved and agreed to, although the claimant has no reason to suppose the contrary.” I protest therefore against Lord Redesdale’s authority being marshalled against me in the present matter

along with those of the law Lords specified by Lord Kellie, as if I had questioned his opinion in the Montrose case.

As Lord Kellie, in fine, has brought the Montrose case into contrast with his own claim, I may add that while, as he states, the noble and learned Lords took several months to consider their judgment after the argument had been concluded and the evidence was before them, the entire hearing of the Montrose case from the opening speech of the claimant to the speeches of Lord Chancellor Cranworth and Lord St. Leonards in moving the Resolution, was comprised between the 18th of July and the 5th of August 1853 inclusive; while the "judgment" was pronounced eleven days after the reply for the claimant, and actually before the evidence had been printed, much less examined by the noble and learned Lords who advised the Committee. This fact may serve as an illustration of the terms which Lord Kellie has cited from my Address to Her Majesty.

I shall conclude my remonstrance upon this point with the criticism of one whom every one will admit to have been an impartial judge, the Hon. J. J. Gilchrist, Supreme Judge of Claims in the United States, to whom the representative of a branch of my family, settled for the last two centuries in Virginia, sent my Report for perusal. He wrote to my clansman as follows:—"The 'Report' affords a study of deep interest to all who are fond of historical investigations. . . . I entirely sympathise with the feeling which prompted the eloquent language of Lord Chief-Justice Crewe,—'I suppose there is no man who hath any apprehension of gentry or nobleness, but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or twine thread to uphold it.' But the claim of the Earl of Crawford stands on a firmer basis than mere sentiment. Without pretending to a knowledge of English Peerage Law, which lies out of the path of legal investigation in this country, I cannot understand how the House of Lords reached the result that the patent of the 18th of May 1488 was invalid, and that the 'Act Rescissory' should be sustained. The

reasoning against the 'Act Rescissory' seems to me conclusive—unless there be some mysterious art necessary to be applied in the construction and effect of an Act relating to dignities, which does not obtain in construing other Statutes. The 'Act Rescissory' seems to me to be as dead as the members of the Parliament that enacted it. Without undertaking to enter into the argument, I conceive that the facts, firstly, that all the grants of James III. survived the Act and were not impaired by it, and secondly, that the Earldom of Glencairn, a case precisely in point and a precedent for this, was held not to have been affected by it, furnish sufficient evidence of the claim made by the Earl of Crawford."<sup>1</sup> An opinion like this by a senator of our common British blood, but speaking from a sphere removed above that of our petty passions on this side of the Atlantic, reads, as I have always thought, like the sentence of posterity.

I have to apologise—and I think every generous heart will accept my apology—for this vindication of words addressed by me twenty-five years ago in protestation to the Queen against a Report to Her Majesty which I had reason to qualify as proceeding on error and injustice,—words of which I am not ashamed, because they are true,—words which have now been brought up against me in such a manner as to suggest utter and ignominious defeat upon a claim, the merits of which, I take it for granted, are unknown to those whom Lord Kellie addresses, and that with the view of damaging my advocacy of a cause which has suffered through an overruling by the House of Lords of the authority and the final judgments of the Court of Session pronounced before the Union precisely parallel to that which I have shown to have been utterly unjustifiable in the case of Montrose. Different from a petard which explodes only in one direction, the charge founded on these words of mine explodes both backward and forward, against Montrose in one direction and Mar in the other; and I have thus been compelled to include Montrose as well as Mar in this vindication.

<sup>1</sup> The entire Letter may be found in the *Lives of the Lindsays*, i. p. 173.

The question remains, Does my having protested to Her Majesty in 1853 against the Report on the Montrose claim incapacitate me as a "disappointed" claimant, and thus as a suspicious advocate, from protesting, as I have done at Holyrood, against a real injustice done—not to a claimant, but to a peer in possession—Lord Mar? I cannot pass a verdict of acquittal on myself,—my actions must speak for themselves. But the charitable construction would, I think, have been to regard my action as animated rather by the sense of justice to an injured man, and a desire to assist in remedying that injustice, than by a petty pique against the agents and instruments of that injustice—a system in the present instance acting through personal machinery—even although I may have myself suffered from its activity. But this is undoubtedly true, that the unprecedented opposition to and the totally unexpected result of the Montrose claim drew my attention to the principles and history of Scottish peerage law in a manner which induced me to refer the unfortunate result of that claim, as I refer now the injustice done to Lord Mar, to a vicious system of inveterate tradition rather than to the perverseness of individuals who stood and stand forth as the representatives of that system in 1853 and 1875. My experience of the Montrose claim has thus rendered me more lenient than I could otherwise have been to those whose intervention has been the subject of my criticism and remonstrance in my Protests and in these present pages. This will appear more clearly in the succeeding and closing Letter of this series.

So much for the second category of charges—an ungrateful subject, that I could not but meet by refutation, yet which I willingly dismiss with a repetition of my belief, that the attacks I have refuted have been of the nature of arrows and darts in forensic, or quasi-forensic, warfare; while I dwell with complacency and acknowledgment upon the personal compliments with which Lord Kellie begins and ends his Letter, as expressing the more generous feelings of esteem and respect, which I fully reciprocate.

## LETTER XVIII.

## WHAT REMEDY?

I HAVE now to conclude this series of Letters by a consideration of the question, What is the remedy for the present state of things, first, as regards Lord Mar, and secondly, as regards the Peers and the people of Scotland, as affected by the assumption of supreme jurisdiction in regard to dignities by the House of Lords, exhibited in its earlier stage by super-session of the laws of Scotland, and of decisions of the Court of Session, and latterly by the assertion of an absolute right of jurisdiction? Under this second head I shall offer some practical suggestions on the manner in which claims to Scottish dignities ought, I think, to be prosecuted from this time forward, and on the question, What is the proper tribunal to which all questions arising upon claims to vote at the elections at Holyrood ought to be referred for settlement?

## SECTION I.

*General considerations.*

Two remedies suggest themselves in respect to Lord Mar's position. The first and simplest is for the House of Lords to cancel the Order of the 26th February 1875, and thus at once remove the obstacle to the exercise of his rights at Holyrood, and extricate itself with the least possible difficulty from its present embarrassing position. The course thus suggested is the logical consequence of the more discriminative views which the Select Committee and the House of Lords have taken of their legal powers within the last two years. The House has admitted that it possesses no power of legislation except in so far as such is delegated to it by the Legislature in limited and express terms, as by the Act of 1847, and that that Act gives them no

power to tamper with the Union Roll; while it follows necessarily from this admission, that the private rules of the House, identified with the names of Lord Mansfield and Lord Camden, cannot supersede the laws and customs of Scotland to which those rules are contradictory. But the Order of the 26th February 1875 effects a revolution in the order of precedence established by the Roll, independently of the flaw attaching to it from its having been issued at a moment when the House was *functus officio*, and the initiative for future action rested exclusively with the Sovereign; and the Resolution adopted by the House proceeds upon the application of Lord Mansfield's and Lord Camden's rules, more especially Lord Mansfield's, as against the law of Scotland. Both the Resolution and the Order thus proceeded *a non habente potestatem*, and were *extra vires* of the House, by its own virtual admission and acknowledgment. The Resolution, as a barren rose, may be allowed to wither on its stalk; but the Order is a thorn in Lord Mar's side, which ought to be plucked out, and by those who planted it there,—and I prefer this consideration with confidence in the candour of the House and its sense of justice. Nothing is more graceful than a frank acknowledgment of error; and retirement from a false position inadvertently but honestly taken up in a matter of foreign law and right, under the influence of tradition, confers honour on the highest. Every difficulty would be thus removed. There is little fear that any two peers will be found to protest against Lord Mar's vote when the cancellation of the Order has afforded proof that Lord Mar's case does not fall, in the opinion of the House, within the provisions of the Act of 1847.

But the remedy for the present state of things as affecting the interest of the Peers and people of Scotland, through the assumption of supreme jurisdiction in dignities by the House of Lords, opens a broader field for consideration. The peril to which the Earldom of Mar has been exposed of being crushed down by the Report of 1875, had Lord Mar been less fearless and energetic in defence of its rights, and of the cause of the Scottish Peerage embodied in his person, must be apparent to every one; but a general proposition such as mine, that the independence and security of the whole Scottish Peerage is at stake, may appear too extravagant for entertainment, and many

even of those most deeply interested may be inclined to treat the suggestion with indifference. At the risk therefore of wearying their patience, I must perforce request their indulgence while I enumerate the causes for alarm which call for a remedy, as threatening their existence as a national peerage, and which they will find to be very real if they will but take the trouble to investigate them. I endeavoured to prepare the way for this in the penultimate and final articles of my first Protest, urging my brother peers to resist the acceptance of Lord Kellie's vote as Earl of Mar under the creation of 1565, on the ground that any homologation of the action taken by the Committee for Privileges would tend to rivet the chains that have been gradually coiling round their limbs and liberties during the last century. My words in these two articles may serve as a text for what I have still to say,—they were as follows:—

“VI. Because the vote of the Earl of Kellie as Earl of Mar is tendered in virtue of the Report of a Committee of Privileges which proceeds as its basis upon a principle of overruling the final judgments and disallowing the paramount authority of the Court of Session in dignities, as it existed previously to and at the date of the Treaty of Union; a principle which, originating in misapprehension and oversight, has been in operation from and since the Glencairn claim in 1797, was affirmed and systematised in the Montrose claim in 1853, and has found its most recent expression in the Report upon the claim of the Earl of Kellie to the Earldom of Mar in 1875,—the Reports in each of these claims affirming documents upon which the rights of the heir to these dignities depend, to be invalid, null, and void, in the face of judgments of the Court of Session in the seventeenth century, standing and operative in the present day, which pronounced them valid, effective, and operative—the Committee of Privileges giving effect, on the other hand, to documents which the same Supreme Court had, in the same century and in the same breath, pronounced invalid, non-effective, and inoperative,—thus inflicting cruel injury upon the heirs in each of these three cases; although the noble and learned

Lords who advised these Committees would, there cannot be a doubt, have advised differently, especially in this last case of Mar, but for the controlling force of the system which has grown up in the development of the principle in question:—Acceptance of the vote of the Earl of Kellie as Earl of Mar, in virtue of the Report, grounded as above, would, under these circumstances, amount to a sanction and homologation of the principle indicated; and such sanction and homologation must import very grave peril to the peers of Scotland, and to heirs and claimants of Scottish dignities at a time when the above novel and revolutionary principle, adopted and enforced by Committees of Privileges, threatens, if acquiesced in, to deprive them of all security against their ancestral rights, as dependent on judgments of the Court of Session, being overruled and set aside hereafter, as in the three cases above specified—the uncertainty and peril being now such that no man can say where the blow will next fall. . . .

“VII. Because, finally, acceptance of the vote of the Earl of Kellie as Earl of Mar upon the Report of the Committee of Privileges, founded upon the principle above shown, would be incompatible with rightful obedience to the law of the land, and due reverence for constituted authority; and would thus amount not merely to the sanction of private wrong, but to the infliction of public injury, striking at the roots of justice.”

Since this was written (and I need not interpose that the remonstrance has been as yet unavailing) the House of Lords has taken a step still further in its progress towards absolutism in regard to Scottish dignities, as exhibited in the speeches of the noble and learned Lords who addressed the House on the Duke of Buccleuch's Resolution, and in the Report of the Select Committee,—to say nothing of Lord Selborne's proposition in a more extreme sense in his speech upon Lord Huntly's questions. The perils I apprehended at a distance when I wrote that Protest, and when I published my Montrose Report, have thus been brought very close to the Peers of Scotland; and the remedy which I suggested originally in 1853, and again advanced in my second or “Additional Pro-

test" in 1879, appears to me to have become imperative, if those perils are to be averted. The remedy is simple, and is in the hands of the Peers and the claimants of Scottish peerages, if only they choose to put out their hands and grasp it. It consists, in a word, in reversion to the ancient and time-honoured usage of preferring claims to Scottish peerages before the Court of Session, and in a reference of all matters of dispute at the elections at Holyrood turning upon the right to vote to the judgment of that tribunal.

## SECTION II.

### *Enumeration of Perils.*

I shall preface my special vindication of the remedy suggested by an exposition of the leading perils that threaten us under the existing and modern system and procedure in peerage claims, and which would be avoided in great measure, if not entirely, by recurrence to the ancient. If I draw illustrations from cases anterior to that of the Earldom of Mar, it is because my Protests in regard to that dignity are based on the proposition that the action taken by the House of Lords in the the Mar case originated proximately in the action taken by the House in the Montrose and Glencairn claims of 1853 and 1797, and more remotely in that taken by it in the Sutherland and Cassillis claims of 1771 and 1762. These cases all hang together in point of principle. I protested (as the reader will have observed) for remedy of justice in the cases of Glencairn and Montrose, as well as of Mar, in my first Protest; and my illustrations of perils in prospect take their rise necessarily from the moment when the House assumed to itself the power of superseding the laws of Scotland and the decisions of the Court of Session by their own rules and judgments.

(1.) The great and dominant peril to which the Peers of Scotland are subjected in the present state of things, is the assumption by the House of Lords of absolute jurisdiction in dignities, a fact on which I need only touch in order to awaken the reader's mind to a full perception of the risk attending that exercise, however just and honourable may be the character of those who practically control the action of the House in such matters.

The assumption of this jurisdiction by the House of Lords is by no means a novelty ; but it has been exercised rather than categorically asserted ; and neither the Crown, nor the courts of law, have ever given it the slightest recognition, but the contrary. The authority of the Crown has always risen like a rock on the wave of usurpation. It is a tradition, in fact, from the theories and occasional practice of the English House of Lords ; but between which and its exercise, subsequently to the merging of the English House of Lords in the House of Lords of Great Britain, a portcullis has been legally dropped as respects Scotland by the Treaty of Union. The assumption of this jurisdiction by the House on several occasions before the Union was successfully resisted, as I have already stated, *e.g.* by Lord Chief-Justice Holt in the Banbury case, as contrary to law. But no sooner had the Union taken place, than the new House of Lords of Great Britain, inheriting the traditions of the defunct chamber, entered upon the course of action of which we are reaping the fruits at the present day—welcomed with evident eagerness a cluster of petitions from the Duke of Hamilton, the Marquess of Annandale, Lord Ross of Halkhead, and others, who had been aggrieved by the result of the first election of Representative Peers held after the consolidation of the two Parliaments of England and Scotland on the 17th June 1708 ; and after inquiry into the questions alleged by the petitioners, the House passed a series of General Resolutions, of which the most important was one affirming “That a Peer of Scotland claiming to sit in the House of Peers in virtue of a patent passed under the Great Seal of Great Britain after the Union, and who now sits in the Parliament of Great Britain, hath no right to vote in the election of the sixteen Peers who are to represent the Peers of Scotland in Parliament”—the case being that of the Duke of Queensberry, who had been created by Queen Anne Duke of Dover in the Peerage of Great Britain. This was distinctly a legislative enactment, determining upon the rights and privileges of a subject. The Duke of Queensberry, sitting as Duke of Dover, was thus excluded from his right of voting from thenceforward. Again, in 1711, the Duke of Hamilton having been created Duke of Brandon in the Peerage of Great Britain, the House of Lords passed a

General Resolution (on the 20th December 1711), "That no patent of honour granted to any Peer of Great Britain who was a Peer of Scotland at the time of the Union can enable such Peer to sit and vote in Parliament, or to sit upon the trial of Peers," against which a powerful protest was lodged by nineteen peers, headed by the Duke of Ormonde, based upon the leading *ratio*, "That the effect of the Resolution was to limit the prerogative of the Crown in the creation of Peers; and that the prerogative of the Crown, . . . in granting patents of honours . . . with the privileges depending thereon, ought not, on the construction of any Act of Parliament, to be taken away, unless there be plain and express words to that purpose in the said Act"—the same argument that stands against the Act Rescissory of 1488; "and, we conceive," the protests continued, "there are no such plain and express words for that purpose in the Act of Union." The protesters also called attention to the fact that "the prerogative of the Crown and right of the Duke depending in the case before them upon the construction of an Act of Parliament, through counsel, by order of the House, were heard at the bar, and all the Judges were ordered to attend at the same time, yet the opinion of the Judges was not permitted to be asked touching the construction of the said Act of Parliament." All this took place without any reference from the Crown, and thus *ultra vires*, according to English understanding. The Duke of Queensberry was consequently not allowed his seat as Duke of Dover from 1719 till his death in 1778, sixty years afterwards, when the Dukedom (of Dover) became extinct; and the Dukes of Hamilton were similarly excluded from their seats as Dukes of Brandon till 1782, when on petition from the then Duke of Hamilton and Brandon to the Sovereign, George III., referred by the King to the House of Lords, the House—thus for the first time empowered to act according to legal understanding—after summoning and hearing the opinions of the Judges, which opinions were unanimous, resolved, "That the Duke of Hamilton was entitled to his writ of summons," which Resolution and Report they submitted to the King, "to your Majesty's wisdom and justice." The House had on more than one occasion originated and disposed of claims to Scottish dignities during the interval between the Union and (to take an average epoch) 1847; but, with the exception of

certain irregular proceedings after the election of 1790, elsewhere noticed, I am not aware that the House ever assumed the independent authority I am now dealing with till the recent Order of the 26th February 1875, and the positions taken up by Lord Redesdale and Lord Cairns in the debate upon the Duke of Buccleuch's Resolution, and in the Report of the Select Committee,—always distinguishing that position from the extreme point of revolution indicated in Lord Selborne's more recent speech, given in the preceding Letter.

Meanwhile the House had been more successful in permanently appropriating the character of a Court of Appeal from the Court of Session. I have already noticed the initiatory step, viz., the General Order 19th April 1709, "that after an appeal shall be received by this House from any sentence or decision given or pronounced in any court in Scotland, and an Order made by the House for the Respondent to answer the said appeal, and notice of such Order duly served on the Respondent, the sentences or decisions so appealed against from such time ought not to be carried into execution by any process whatever,"—this being a direct infraction of the Claim of Rights (if still an element of consideration in 1709) and of the Treaty of Union.

Almost all the perils I have still to mention spring from this root of bitterness, the assumption of supreme jurisdiction by the House of Lords in dignities—a jurisdiction without appeal, as it necessarily becomes when the remedial intervention of the Sovereign as ultimate judge is excluded.

It will be observed that both the General Resolutions in respect to British peerages conferred on Scottish Peers subsequently to the Union, and the General Order respecting the execution of the sentences of the Court of Session, were acts of legislation, the former amounting, as was subsequently acknowledged, to an invasion on the Royal prerogative no less than on the rights of the subject; and that by the recent avowal of the House that it possesses no legislative power (except under specific delegation from the Legislature, for which there is no pretence here), both the Resolutions and the Order, and all similar General Resolutions and Orders which infringe upon established law are thus determined to be *extra vires* of the House, as proceeding *a non habente potestatem*. But this

acknowledgment by no means implies that they may not be acted upon.

(2.) Among the earliest of the developments of the doctrine of supreme jurisdiction was the affirmation that the House of Lords is entitled to act, or, as they style it, "judge," in claims to dignities on grounds of expediency as well as law. This has been productive of a crop of weeds which have terribly entangled the footsteps of claimants in matters of procedure, and have introduced an element of uncertainty into the investigation of the claims themselves.

Lord Mansfield laid down the principle in the most explicit terms in his speech on the Sutherland claim:—"It is of importance that all questions concerning peerages should be settled upon the principles of expediency as well as of law; and upon considering this matter, I thought your Lordships must determine upon the charter 1601." I have already shown that the adoption of the rule and presumption in favour of heirs-male, as urged on the occasion of the Cassillis claim in 1762, was for the object of discountenancing claims to dignities descendible to coheirs by Scottish law in the person of the eldest daughter and her heirs, and failing such, of the second daughter, and so on, as contrasted with the preferable English system by which, when a barony descendible to heirs-general ends at the death of the tenant, leaving more than one daughter, but no son, it sinks into abeyance, and is thus—the inference is clear—got rid of. I shall limit myself in this present Letter to pointing out how the principle of expediency affects claimants and procedure in peerage claims, apart from the discussion upon the evidence. It does so in two main points—first, the quality and limits of the opposition which may legally be offered to a peerage claim; and, secondly, the immunity of claims to peerage from prescription.

1. In the first place, as regards the right of opposition, it was laid down by Lord Brougham in the Montrose claim, without dissent on the part of other noble and learned Lords, who concurred at least in the action taken by the Committee for Privileges on the occasion, that the House of Lords, sitting in Committee for Privileges, possessed a "large discretion," which it is entitled to exercise in the interest of the House. The circumstances which elicited this affirmation were as

follows :—When my father, the late Earl of Crawford, advanced his claim to the Dukedom of Montrose created in 1488, the late Duke of Montrose (under the creation of 1707) applied by petition to be allowed to oppose the claim on the grounds of personal inconvenience through the identity of name and of loss of precedency to himself and the other Dukes of Scotland apprehended in case of the success of the claim. This petition was not granted ; but he was allowed by a side-wind to act in every respect as if he had been recognised as a legal counter-claimant, or as having interest in the claim.

In development of this assumption of a “large discretion,” action was taken by the Committee, which resolved, as precedents, into certain principles, which must be presumed in consistency to have become established, through their enforcement against the Montrose claimant, for all future time. Two of these, with a third principle deducible from the Mar case, are here enumerated :—

i. That it is optional on the part of the officers of the Crown, the Attorney-General and the Lord Advocate, to make inquiries and oppose, or not to oppose, in Scottish Peerage claims ; and that it is within the power, if it be not rather the duty, of Committees for Privileges to protect the Crown against the expense and trouble of opposition to such claims. It is hardly necessary for me to repeat here what I have already urged, that the interest of the Crown consists in the ascertainment and knowledge of truth, which can only be attained to by dispassionate inquiry, in abstention from any partisanship either on the part of a claimant or of those who may oppose his claim ; and that they betray the interests of the Crown and commit injustice against a claimant when they depart from the letter or the spirit of this incumbent obligation. The abuse is of long standing. The plea of “expense and trouble” to the Crown cannot be dissociated from the supposed necessity of paying deference to the private engagements of the officers of the Crown as counsel. But the duty to the Crown and to a claimant is the first consideration, to which the other is subordinate. Why should the interest of the claimant be sacrificed to that of the Attorney-General, or Lord Advocate or Solicitor-General for Scotland ? A claim to peerage is the most important of all private causes which can occupy public

attention; and it is a fact of public concern, rather than private.

ii. That in the event of the officers of the Crown declining to undertake, or a Committee for Privileges wishing to protect the Crown from the trouble and expense attendant on such inquiries and opposition, and there being no counter-claimant or party interested to bear that burden, the Committee is entitled on that account, in the exercise of the "large discretion" inherent in it, to permit an absolute stranger, supposing himself entitled, but whom the Committee have decided to have no interest whatever in such claim, to interpose for the purpose of supplying the Crown with evidence and argument at his own expense towards the defeat of a claim referred to the House of Lords for their advice by the Sovereign, and this irrespectively of its justice; to lodge cases for the officers of the Crown to adopt and argue upon, without the latter being under the responsibility of making any independent inquiries, apart from which it would be impossible for the officers in question to ascertain whether the facts and arguments alleged and put into their mouths are just or not; and thus to make a cat's-paw of the Crown for his own personal ends; while, further, the officers of the Crown may retain the counsel of such utter stranger as counsel for the Crown, who may sit with the officers of the Crown within the bar of the House of Lords, act as counsel for the Crown, and take part in the proceedings, if necessary, during the absence of the officers of the Crown. All this took place in the Montrose claim.

iii. That, in the event of a claim coming before the House of Lords by reference from the Crown, the alleged right to which depends on the correlative nullity of an older title of the same name, alleged to be extinct, the peer in possession of that older title by the law of Scotland may—or rather must henceforward in consistency—be refused his title, and compelled to defend himself as a commoner at the bar of the House, and must abstain from voting at Holyrood till the claim of the petitioner to the more modern title shall have been considered and determined upon; and this although the petitioner make no claim to the older title. This has been the procedure in the late Mar case. It follows that if, under the Act of 1847, two peers were to protest against the right of the Prince of

Wales to the Dukedom of Rothesay, or, we will say, of the Duke of Hamilton to that Dukedom, and the House should think fit to order the Duke to appear at the bar of the House, under the provisions of the Act, to prove his title, the House must in consistency refuse to recognise him as Duke, and must treat him as a commoner and virtual claimant till the allegation of the two protesting peers has been investigated and decided upon. The Earl of Mar is in as undoubted possession of the Earldom of Mar on the Union Roll by the law of Scotland as the Duke of Hamilton is of the Dukedom of Hamilton, a dignity descendible to heirs-general precisely like that of Mar. This will not be a pleasant pill for the peers of Scotland to swallow. But fortunately it can only be administered by themselves to themselves in the first instance.

2. As regards the immunity of peerage claims from prescription, it has been laid down that, in the view of the "expense and trouble" occasioned to the Crown and to individuals by peerage claims, and on considerations of broader policy, it is expedient that claims to peerages of ancient date should be discouraged, and that a rule ought to be introduced establishing a bar of prescription against such. The danger to the Scottish Peerage involved in this view, traditional in the House of Lords, must not be undervalued because it may appear remote and undefined. It has its birth in the theory of despotic and dispensative power claimed for the House, guided and enlightened by the teachings of expediency. It is more than a century now since the suggestion was first started and acted upon, as may be remembered, by Lord Hardwicke and Lord Mansfield in the Cassillis claim, when they called attention to the fact that the older Scottish dignities being frequently descendible to heirs-general, and in such cases the eldest heir-female succeeded, and the dignities were thus perpetuated; whereas in English baronies, descendible to heirs-general, and ending in coheirs, the dignity sank into abeyance—a contrast upon which the noble and learned Lords laid down and enforced the novel rule and presumption of male descent upon Scottish peerages of parallel antiquity. But the suggestion was resuscitated and enforced in a broader affirmation by Lord St. Leonards in the Montrose claim in 1853. His *ipsissima verba*, those that formulated the suggestion and those that followed in vindication of it, are too

remarkable in themselves not to require citation :—" My Lords," he said, " it may well deserve consideration whether it would not be wise to put some limit of time upon a claim to peerage, in order to prevent such enormous expense and such consumption of time as must very often take place in regard to claims to ancient peerages."

I need not trouble the reader with the special reasons alleged by Lord St. Leonards in favour of this suggestion from his experience of the Montrose claim—they may be read in a note, and are worth reading as throwing light on the length and breadth of the point I have here insisted upon. Nor need I enter into any exposition of the views protective of ancient peerages against prescription on grounds of public policy. It will be enough to point out that the bar suggested by Lord St. Leonards would strike—1. Against the authority and judgments of the Court of Session in many cases determined by them before and even since the Union, by which judgments the right of heritage in certain dignities has been determined in favour of individuals and their heirs *in perpetuum*—i.e. so long as those heirs continued to subsist. 2. It would strike against the private rights of Scottish subjects, including those here in question as depending upon Scottish law, and existing at the time of the Union, as protected by the Treaty of Union and the Act of Parliament carrying out the provisions of that Treaty. 3. It would strike at the royal prerogative, through which those rights were constituted by the limitations in charters and patents granted by monarchs in ancient times to deserving subjects and their heirs under the respective limitations for ever until annulled by attainder in case of treason, or alienated by resignation to the Sovereign by the tenant *pro tempore* in legal form, either for a regrant under the same or an altered limitation, or *in perpetuam remanentiam*. And further, 4. It would strike at public policy, as it proposes practically to extinguish peerages after the direct line fails and the right of collaterals emerges; whereas dignities, more especially such as are bound up (as those of Mar, Montrose, and Glencairn are) with the history and glory of nations, are, by the consent of the civilised world, a precious and sacred heritage, imposing deep responsibility, like all public charges, on those who inherit them—honourable and profitable to

monarchs and to the commonwealth—while the entire public is interested in their maintenance and conservation.

It is for the Peers of Scotland to reflect that, should this threatened bar of prescription be adopted and enforced by the House of Lords—and no one can say, judging from the past, and from the assumption of supreme jurisdiction in dignities independently of the Queen, which is now asserted for the House, when such a bar, illegal though it would be, may not be established, when the power assumed and exercised is practically unlimited—it would strike at the very roots of the Scottish Peerage, very many of the dignities held by Scottish families being of date far older than 1488, the period pointed at by Lord St. Leonards; while most of these are descendible by their limitations to distant collateral heirs. Many a stately and branching tree, cherished not merely by those who share a common descent, in ranks varying from the peer to the peasant—but by the people of Scotland at large, and by the innumerable family of “*Scoti extra Scotiam*” as landmarks of their ancestral and native history—would thus be levelled with the dust.

(3.) A further chapter of peril opens, of perils positive and contingent, intimately affecting Scottish peerage claims, in the reversal by the House of Lords of the hitherto accepted rules of law applicable to dignities, especially those of feudal origin, as well as to ordinary subjects, to the effect of establishing new rules in supersession of the old, and laying up these new rules in the armoury of the House, to be brought forth and employed as weapons, when needed, when the old are pleaded by Scottish claimants. The arrogation of the right to formulate such new rules dates, as stated in the preceding article, from 1762. The two most important rules are those identified with the names of Lord Mansfield and Lord Camden, and against which these Letters have been a protest from beginning to end. They have been made to overrule the law of Scotland in every cause of controverted succession during the last hundred years, although it by no means follows that claimants, to whose pretension the modern rules have been applied, were not entitled in the majority of cases to the favourable reports of the House on genuine Scottish grounds. There might have been a difficulty about this if the speeches were considered as judgments, but

this error is now repudiated by the House, and we have only to deal with the Resolutions, cleared as these Resolutions must be, of all adventitious matter not warranted by the strict limits of the ancient formula of response to the Sovereign.

But besides these general rules, and many variations from Scottish orthodoxy of less consequence, a most formidable series of innovations upon peerage law, and indeed all law, was initiated in the Montrose claim,—innovations under the influence of which the claim was decided adversely to the claimant on many important points. I give them, with the corrective truths in connection with them, as published in the remonstrance addressed to Her Majesty, with which I prefaced my Report of the claim. There is not one of them which may not be cited as authority in future claims; and such being the case, I make no apology for the quotation. One of the articles specified I omit here, in order to include it under the next head of this category of perils:—

“1. That, whereas it has been held hitherto that a Scottish peerage could only be alienated by resignation, by forfeiture, or by a duly expressed and duly sanctioned Act of Parliament, it is now laid down generally and broadly by the Lord Chancellor of England, that it could be annulled by ‘the omnipotence of Parliament’—that ‘Parliament can destroy a peerage, or take a person’s property, or do anything else’—that is, the Scottish Parliament *could* do so, to the superseding of law, at the single impulse of its autocratic will and pleasure, in the fifteenth, as the British Parliament *can* now do in the nineteenth century. I would humbly represent that this doctrine was unheard of in the feudal ages, and that, although some unscrupulous men have in later times, ‘by a figure rather too bold,’ endeavoured to invest the Parliament of England with the most distinctive attribute of Deity, it is too much to assume (as appears to be assumed in regard to the present case) that what *can* be done must necessarily be done lawfully, and that an assembly which exists only cognately and concurrently with constitutional government, is not bound by the existing and unrepealed laws of the land, as well as by those higher conditions under which, only, power is delegated from God to man. In a word, I deprecate the doctrine thus enunciated—and more especially so in connection with expressions which have recently fallen from noble and learned Lords, indicating an opinion (incredible as it may appear) that Parliament (as distinguished from and disconnected with the Sovereign) can create, restrict, or (as above) annul a peerage—expressions and doctrine dissociating your Majesty from that august body of which you are the head; and which, in arrogating to that body your Majesty’s

peculiar privilege of being the fount of honour, must tend directly and inevitably to the degradation of your prerogative and supremacy—expressions and doctrine, moreover, as I would further remark, closely connected with and akin to an assumption, which pervades the recent discussion, on the part alike of the officers of the Crown and of the Committee, that the House of Lords possesses an inherent jurisdiction and right of decision in peerage matters, irrespectively of reference from the Crown, in utter derogation from your Majesty's supreme and living prerogative, and in oblivion of the grace and confidence reposed in that most Honourable House by your Majesty ; an assumption only tardily, at the last moment, and, as it appears to me, imperfectly, abandoned by the noble and learned Lord who spoke last in moving the Resolution, and that in consequence of vindication of the truth by the learned counsel who represented my father. I only touch, however, upon these assumptions and opinions as indicative of the broad and pregnant principle of the omnipotence of Parliament from which they flow, and against which I protest before your Majesty, as utterly subversive, in its root and its development, of British liberty. I need say nothing more on this head, inasmuch as my father does not dispute that the honour he claims might have been annulled by an Act of Parliament *if* so expressed as legally to affect it ; *if*, that is to say, expressed with due formality and specification as regards the honour and the individual struck at ; *if* sanctioned by the full and particular concurrence of the Sovereign, without which, by the Peerage Law, alike of Scotland and of England, Parliament, by itself alone, is impotent in honours ; and *if*, too, not repealed according to Scottish law and usage, by non-effect and non-operation, or, as it is technically termed in Scotland, by desuetude, *ab initio*. As matter of fact, the Committee have in this case held, that the simple enrolment of an Act on the Statute-book of Scotland, whether duly expressed and sanctioned or not, and whether it took effect practically or not, is sufficient to make it law in perpetuity, operative to cut down and annihilate a Scottish Peerage !

“2. Whereas it is a rule, alike of Scottish and English law, that a Statute must be interpreted ‘in that sense which the words most obviously suggest to the understanding,’ that is, according to the actual words used and not according to the presumed intention of those who framed it, every particular word being entitled to its full and due value, weight, and consideration ; while it is only where the words admit of two different meanings, or where the effect of the Statute is to work injustice, that the words may be departed from—although exclusively, under such contingency, in favour of justice and mercy,—and all this of course *a fortiori* in the case of penal Statutes, and of that most susceptible and shrinking of all subjects of which the law takes cognisance, the matter

of honours :—Whereas such has been the rule and practice hitherto, the principle is now practically asserted and adopted that Statutes, however confessedly unjust, impious, or disloyal, are to be interpreted and enforced according to the presumed intention of the Parliament that pass them, and not according to the grammatical meaning of the words actually used ; and that words may be either virtually expunged from such Statutes, or positively imported into them, in order to give that presumed intention effect—against justice and mercy, in penal Statutes, and in the matter of honours. And this principle has been extended still further in its application, in so far as to excuse illegality and injustice, to wit, illegal confiscations, on the ground that the confiscators had reason to believe that an Act of Parliament would be thereafter passed to legalise those confiscations—the illegal and just denial to a peer of his rightful title, on the ground that the enemies of that title had reason to believe that it was intended to deprive him of it—and the (alleged) illegal and therefore (as presumed) unwarranted assumption of a title on the part of one not entitled to it, on the ground that he had reason to believe that it was in contemplation to grant it to him. A melancholy departure from the spirit which animated Sir Edward Coke when he penned his gracious sentence, that ‘ Acts of Parliament are to be so construed as no man that is innocent or free from injurie or wrong be by a literal construction punished or endamaged,’—a *dictum*, indeed, of which the claimant feels himself wholly independent in the present case and question, where the clear construction of the words is such as to have necessitated the expedients above remarked upon, in order to evade their distinct testimony in his favour.

“ 3. That, whereas the maxim, ‘ In dubiis benigniora semper sequenda sunt,’ a generous and a just one, has hitherto been in observance both in Scotland and England, and especially so in honours, this rule of charity has now been practically superseded and set aside, and in a case where, by direct admission on the part of one noble and learned Lord, and involuntary betrayal on that of another, ‘ all is in great obscurity ’ (an obscurity only arising, indeed, from wilful abnegation by those noble and learned Lords of the wholesome and cheering guidance of precedent and peerage law), everything esteemed doubtful has been interpreted to the disadvantage of the claimant.

“ 4. That, whereas it has been held hitherto (and it has not been denied by my father’s opponents in this claim) that penal Statutes must be interpreted most strictly, and especially so in honours—with the most anxious desire and effort to avoid attainders, forfeitures, and deprivations, and to construe such Statutes in favour of the persons who may be supposed to be struck at by them—and this, of course, *a fortiori* where those persons are innocent and undeserving of such infliction, it is now practically ruled by noble and learned Lords in this case, that—even where innocence and desert are admitted on all sides—a

penal Statute is to be strained to its utmost in favour of forfeiture, and against mercy ; that where a qualification is introduced limiting the application of the Statute to a particular class of persons, such qualifications may be interpreted (and, indeed, if this precedent be followed, *must* be interpreted) as merely an incorrect mode of stating that the persons generally alluded to are *all* struck at without qualification—the words creating the qualification being thus (as above) virtually expunged ; and that words may, or must, be imported into the Statute, which are not there, in order to fix this application. I humbly represent that such a rule of construction has never hitherto been adopted in penal Statutes, and that its recognition and enforcement now will have the most serious effects, not merely upon future peerage claims (if referred to the House by your Majesty), but upon public security and confidence. It amounts, in fact, to an introduction of the principle, abhorrent hitherto to the British heart and mind, that an accused person is to be presumed guilty till proved innocent.

“ 5. That, whereas it has been ruled in peerage law since (at least) the commencement of the fifteenth century, that it has been the correspondent principle and usage in all cases of attainder, forfeiture, and penal infliction down to the present moment, that general words in a penal Act are insufficient *per se* to affect individuals, but that the individuals (and their heirs) must be specifically mentioned, and the honours intended to be annulled must be specifically annulled, in order to give those general words effect ; this noble rule—distinctly laid down in the weighty Norfolk decision in 1425—is now reversed, and it is held that peerages may be abolished by Parliament in the aggregate, provided only that the period within which they have been created is specified—the specification of that period being sufficient to establish that the peerages struck at are mentioned expressly by name,—a direct departure, I presume to think, from the broad presumption of innocence and immunity which is cast as a shield over the life, property, and fame of every individual British subject.

“ 6. That, whereas it has been the rule and understanding hitherto, that remedial Statutes framed for the purpose of redressing wrong and expiating iniquity should receive the most large and liberal interpretation in favour of those persons whom, in the calm and contrite judgment of the Legislature, they may feel conscious of having injured ; it is now practically established that remedial Acts are to be most strictly interpreted against the avowed objects of those Acts and the expressed intention of the Legislature ; and that the specific mention of the individual, the strict legal proof that he falls within the scope and intention of the Act, which is no longer to be required in the case of a penal Act (even striking at honours) shall be imperative henceforward in order to entitle him to the benefit of the remedial Statute.

. . . . .

“ 8. That, whereas it has been hitherto ruled that the warrants and signatures which pass under the eye of the Sovereign, and possess his sanction and authority, govern the interpretation of patents or charters subsequently executed out of the Royal presence in obedience to those warrants by the Clerks of Chancery ; and that if those patents or charters vary in any respect (as they often do vary) from the warrants, they fall to be corrected by reference to the warrants—the eye, cognisance, and authority of the Sovereign, as the fountain of honour, being first, last, and everything in honours ; this rule is now practically reversed, and it is held that the patents or charters are to govern the warrants, and that if any discrepancy exist between the warrant and the charter, the warrant is to be corrected by the charter and not the charter by the warrant—a principle which condemns more than one antecedent Resolution of the House of Lords, and which (if it possess any effect at all—if it be not *ipso facto* null and void, and as dealing with a matter above and beyond the competence of the House) must supersede the will and authority of the Sovereign from henceforward by the will and authority of the Clerks of Chancery—and not in peerages only, but with regard to all property granted by the Crown, whether in past, present, or future times.”

I remonstrated against these novel principles in 1853—principles which strike at the very foundation of law, whether of dignities or ordinary subjects—as having revolutionised the law of peerage so far as the act of the House of Lords could have that effect apart from the Legislature ; but there is no power even for the Legislature to legitimise them. It is true that by the recent disclamation by the House of all legislative power, and by its declaration relegating the *dicta* of noble and learned Lords in their speeches to the category of mere opinions, not judgments, the principles above tabled may thus be considered to be left open to adoption or rejection by future Committees for Privileges. Still, the injustice they contributed to perpetrate in the Montrose case is self-evident ; and there is nothing to prevent noble and learned Lords of a later generation from digging them up from under the ruins of the Montrose claim in order to reapply them, with the sanction of the authority of Lord Cranworth and Lord St. Leonards, against future claimants of Scottish peerages, when similar questions of construction and law and legal presumption come before Committees. And if this be not a grave peril in prospect for the Scottish peers, I know not what is.

(4.) The power assumed and exercised by the House of

Lords to set aside and supersede final judgments of the Court of Session pronounced before the Union, in favour of their own opinions of what those judgments ought to have been, suggests a peril to the Scottish peers and to the people of Scotland generally, akin to that which I have just dealt with. The assumption was first made in the Cassillis claim, when the decreet by the Court of Session in the Oliphant case in 1633 was set aside by Lord Mansfield—and again in the Sutherland claim—on a side issue, but coupled with words stigmatising it as a very bad decision—although proceeding from a tribunal without appeal, suggesting the reflection that a Committee for Privileges, which asserts the same finality for its own decision, ought to have ascribed it still more emphatically to the Supreme Court of Scotland. The rule styled Lord Mansfield's was established in the teeth of the Oliphant judgment, and the disallowance of that judgment was reiterated in the Sutherland case in 1771, and is a standing fact at the present day, inasmuch as the application of Lord Mansfield's law in the recent Mar case is based exclusively on the supersession of the Scottish judgment. The overruling of the *Glencairn v. Eglinton* judgment of 1648 in 1797 and 1853, and of the *Mar v. Elphinstone* judgment in 1626 in the recent Mar case, are similar examples. I noticed this innovation in my address to Her Majesty as follows:—"That whereas the judgments of the Supreme Civil Court of Scotland in peerage cases pronounced before the Union, at the time when that Court possessed supreme and ultimate authority, without appeal to King or Parliament, have hitherto been respected and obeyed as final and ruling decisions, governing the existence, the descent, and the relative precedency of many ancient peerages, it is now ruled that those decisions are not binding upon the House of Lords at present or subsequently to the Union,—a rule which, I submit, must have a broad and searching influence on Scottish peerage claims in future, besides opening the door to re-discussion of many points and subjects hitherto supposed to be settled for ever."

But it would be rash to assume that this making ducks and drakes as it were of solemn decisions of the Court of Session, can under no possible circumstances affect other interests than that of peerage; and notwithstanding any suggestion based on

the sanctions of prescription, I shall dismiss this present peril by citing the eloquent words with which William Earl of Glencairn concluded his "supplication" to the rebel Parliament in 1649, in remonstrance against their impending action in annulling the decreet of the Court of Session, pronounced in his favour in the preceding year,—words almost prophetic in their note of warning :—

"And, if it sould not be denayed bot that the leidges may call in question befor the Court of Parliament the decissions of Session, consider how it is not onlie possible, bot verie liklie, and probable, and inevitable, that contentious and unsatiable men wold bring in questioun the maist pairt of all decisions that haive been fra tyme to tyme, efter muche debait and trouble among the pairties, concludit be the Lordis, or that sall be concludit in tyme to cume ; and then quhat uncertaintie haith the haill leidges of thair honouris, fortunes, and estaitis, and quhat confusion will thence aryse, may be obvious to the sense of anye—it being manifest that the maist pairt of the subjects of the kingdome bruikis thar fortunes and estaitis be virtew of the lawes of the kingdome and sentences of the Senate and Supreme Court of the Sessioun, as *onlie Judgeis in all matteris of richt and heritage*—yea, in (e'en, even) the very act of prescription sould not secure thame in thair present fortounes, for even thay may contravert decissions befor a prescryvit tyme, seeing they may affirm *bonam fidem* in not contraverting the same befor this noveltie and new act of the Erle of Eglintoun's, if the same sould be admitted and granted, contrar to the receivit practeis of all former tymes and liberties of the Sessioun and leidges. And yit, for all this, it is cleir be the law and be the very institution of the Colledge of Justice, that the Lordis of Sessioun ar not exempt from punishment if they sall malverse or behave thamselffes baselic in thair places by brybeing, partiall counsell, or suche lyk misdemeanours, against all quhich the leidgis have ther awin proper remedies, and may geive in thir lawful complaints, quhilks can na wayes tak away the richtis of pairties obtenit be thair saidis decisions : *and if this decreit and senttence, obtained by your Honouris' supplicant efter so lang disput and pley of law, befor the onlie Supream Judge of all matteris of richt and heretage, sould be now called in question, then it sall necessarilie follow, be inevitable consequence, that all decreitis gevin be that same Senate of Sessioun may be raiversit (reversed) and annullit, quhilk were the opening of ane doore to overturne all the richtis of the subjectis, brukkit be thaim be vertew of decreits of the Lordis of Sessioun.* And quther (whether) or not this be of ane deep and dangerous consequence, to put all the leidges in uncertaintie of thair richtis, is humble offerit to the consideratioun and justice of the Parliament."

(5.) A peril grounded on the same basis of supreme jurisdiction asserted for itself by the House of Lords, but of comparatively recent evolution, consists in the principle that a Committee for Privileges is not bound in any way by the views upon which a previous Committee for Privileges has founded its report—or, as it is styled, decision or judgment upon a claim involving the identical point of law and construction; but that Committees are entitled to consider each case that comes before them upon its own merits, irrespectively of such precedents. The development and bearing of this principle can hardly be appreciated without a few words on the subject of certain peerage claims—that to the Dukedom of Norfolk in 1425, that to the Earldom of Devon in 1830-1, that to the Dukedom of Montrose in 1853, and that to the Earldom of Wiltes in 1862; while the Mar case of 1875 equally furnishes its illustration. It will be seen as I proceed how the five cases illustrate the principle I here dwell upon.

1. The Dukedom of Norfolk was created by Richard II. in 1397, under historical circumstances identical with those of the creation of the Dukedom of Montrose by James III. in 1488. The Norfolk honour was supposed to have been annulled by a general Act of Revocation, or Act Rescissory, passed by Henry IV. and the successful rebels in 1399, precisely as the Montrose honour was alleged to have been cut down by the general Act Rescissory passed by James IV. and the successful rebels in 1488. Neither the son of the Duke of Norfolk, nor the son of the Duke of Montrose, nor the son and grandson of the Earl of Glencairn (created at the same time with Montrose), assumed the dignity for many years after the death of the respective granters—grave reasons, elsewhere explained, rendering it impossible. But the son of the Duke of Norfolk claimed the Dukedom in 1425, and it was adjudged to him by the King and Parliament on these among other *rationes*:—that neither the Duke, the original grantee, nor his heirs were specially mentioned in the general Act Rescissory, apart from which special mention the Act could not affect the right to the honour,—that the creation had not been specially revoked by Parliament otherwise in the case of the Duke and his heirs; and that other honours created *in pari casu* with the Dukedom, and similarly struck at (in general terms only) by the Act

Rescissory, had survived unaffected by it. The Montrose claimant in 1853 founded upon every one of these *rationes* as a precedent for his own case under the ruling upon which Lord Brougham had advised the Committee for Privileges in the Devon claim in 1830-1, viz., that the principles in law applicable to dignities were the same in England and in Scotland for a considerable time after the development of the feudal system in the two countries, and that it was lawful to argue from one to the other for illustration and guidance in cases of obscurity. I may also mention that Lord Brougham in 1832 decided the claim of the Earl of Shrewsbury to the Earldom of Waterford in the Peerage of Ireland, created in 1446, on the ground that "a dignity or title of honour cannot be taken away (where there is no deficiency or corruption of blood) except by express words in an Act of Parliament."

2. The Earldom of Devonshire, or Devon, was created by Mary Queen of England in 1553, in favour of the Courtenays, in whose illustrious race that Earldom had long been hereditary, with limitation "*hæredibus suis masculis in perpetuum*," that is, to the heirs-male of the patentee; and the dignity was claimed by the collateral heir-male, William Viscount Courtenay, in 1831. The question was whether the limitation "heirs" simply, without the adjunct "*de corpore*" included collaterals; and the Committee reported in favour of the claimant, as advised by Lord Brougham in an elaborate speech, in which he urged (*ut supra*) that the early law of Scotland and England had been originally the same in honours; that, although the English law had undergone "many important changes in the course of ages," the law of Scotland "*remains in viridi observantia* up to the very period of the Union," and that, as according to Scottish understanding and rule the limitation "*hæredibus*" without the adjunct "*de corpore*" includes collaterals, that understanding and rule was applicable to the construction of the limitation in the Devon patent. Dating the analogy from the period when the Celtic was supplanted by the Norman polity in Scotland, Lord Brougham's argument from analogy as between the gentilitial law of the two countries was legitimately drawn; and the conclusion in favour of the Devon claimant sufficiently justified. I have personally no reason for especial gratitude to Lord Brougham as an

adviser of Committees for Privileges; but, with frequent error, the result of a precipitation grounded on self-confidence, he had a keen and powerful intellect, enlarged legally by an early acquaintance with the Scoto-Roman law, and not unfrequently grasped great principles, although as often failing in the appreciation of details. His better star predominated, I think, in the Devon decision, as it also did in that of the Earldom of Waterford, above noticed.

3. When my father advanced his claim to the Dukedom of Montrose, created in 1488—a claim grounded on broad principles of law, independently of any precedent—he clenched his argument by founding upon two precedents, in which parallel cases had been decided to precisely the same effect in England and Scotland, each of which (although more peculiarly the Scottish precedent) amounted, he urged, to *res judicata* in his favour; and on each of which he took his stand, as binding on the House of Lords. He founded, first, on the historical and legal parallel between the Dukedom of Montrose and that of Norfolk, and upon the *rationes decidendi* laid down (as above) in 1425, which applied word for word to his own claim,—the parallel between a Scottish and English case of such remote antiquity, and the legal inference therefrom, being justified by the argument and ruling of Lord Brougham in the Devon case. My father founded, secondly, on the judgment of the Court of Session in the parallel case of the Earldom of Glencairn, which judgment, pronounced in 1648, being final and irreversible, and regulating precedence at the present day, was binding upon the House of Lords, to the effect that the Act Rescissory did not cut down the Earldom of Glencairn and therefore could not cut down the Dukedom. Lord Loughborough had overruled the decret and advised the Committee on the Glencairn claim in 1797 that the Act had cut down the Earldom, but this, Lord Crawford contended, could be no obstacle, as the judgment of 1648 was binding upon the Committee in 1797 as it was in 1853; and if Lord Loughborough disregarded it, *tant pis pour lui*,—his errors and misdirection could not countervail the weight and prevenient obligation, the standing judgment, the *res judicata*, of 1648. But Lord Cranworth and Lord St. Leonards advised the Committee, in opposition to the Montrose claimant on both these points and precedents, by application

in the one instance of the principle which I am now remarking upon, and in the other instance (incredible as it may appear) by the exact reverse of it. Lord Cranworth and Lord St. Leonards disallowed the Norfolk decision as a precedent on grounds not touching the historical and legal points of parallelism (in short, by a side issue, as Lord Mansfield had evaded the Oliphant judgment in 1762 and 1771), and either set the *rationes* cursorily aside or passed them over *sub silentio* by the aid of certain of the novel principles enumerated under the third article of peril *supra*,—and I may add, in the face of the judgment in the Waterford claim in 1832 above noticed;—thus, in fact, inaugurating the principle of independence of precedent which we shall find Lord Chelmsford shortly afterwards affirming and acting upon in the Wiltes case. On the other hand, Lord St. Leonards ruled that the views laid down by Lord Loughborough in his speech on the Glencairn claim in 1797, viz., that the Earldom of Glencairn created in 1488 had been cut down by the Act Rescissory, was the only precedent the House could look to, and was binding upon the House as against the Montrose claimant; and this, although the decret of 1648 was, according to Lord Loughborough's own statement, before his eyes, and although the Montrose claimant had proved that almost every fact affirmed by Lord Loughborough was erroneous, which Lord St. Leonards did not attempt to deny—enforcing the “judgment” as binding, whether right or wrong, as the Mar “judgment” of 1875 has similarly been held to be binding, right or wrong, by Lord Redesdale, if not by Lord Selborne and Lord Cairns. The Committee for Privileges thus, in the Montrose case, got rid of the Norfolk precedent by a side-wind (although they did not attempt to impugn its *rationes*), virtually ruling that they were not to be governed by precedent; and got rid of the Glencairn precedent of 1648, which was *a fortiori* binding on the House as *res judicata* upon the individual point before them, by enforcing the absolute effect of the speech of Lord Loughborough in 1797 as a precedent to be maintained *coûte que coûte* against the Montrose claimant before them. The Committee thus blew hot and cold in one breath—like an ice storm from the north and a simoom from the south, with equally destructive effect. What adds to the complication is, that the Glencairn Resolution was simply to

the effect that the claimant had not made out his claim, keeping absolute silence as to the views expressed by Lord Loughborough in his address to the Committee; whereas by the recent declaration of the House, viz., that the speeches in Committee are mere opinions, and may not be imported into the Resolution, or made the basis of action, Lord St. Leonards's enforcement of Lord Loughborough's speech, as binding against the finding in the Montrose claim, was, it is now averred, unwarrantable and illegal,—independently of the fact that the ruling in that speech was itself illegal in presence of the decret.

4. Lastly, with the precedent of the Devon decision in view, Mr. Scrope, the heir-male collateral of William Le Scrope, Earl of Wiltes, created as such by Richard II. in 1397, at the same moment with the Dukedom of Norfolk, claimed the Earldom in 1869, on the ground that he was entitled under the Devon decision, founded on the Scottish rule that the limitation "hæredibus" without further addition included collaterals. But Lord Chelmsford, who advised the Committee for Privileges, disallowed the claim on the ground that he considered the Devon decision by Lord Brougham to have been founded on error, and that the Committee for Privileges ought not to fall into the same error by following it as a precedent. His words were as follows:—

"I cannot agree that the determination of one Committee of Privileges must be a binding and conclusive authority upon another. It may be conceded that an opinion expressed by those who are exercising a quasi-judicial function will always be entitled to respect and consideration; but it cannot claim the authority of a final decision upon any particular point of law in the same manner as a judicial determination of the House sitting as a tribunal of ultimate appeal from the judgments and decrees of the courts of law and equity. . . . A resolution of a Committee of Privileges is in no sense a judgment; and although admitted to be *prima facie* valid and conclusive, yet it does not establish a precedent which all future Committees are bound to follow. . . . The Resolutions of Committees of Privileges are merely for the purpose of information and advice to the Crown. The Crown, though it generally acts upon, is not bound by them. It may exercise its own discretion in giving or refusing its assent to the Resolutions."

Here again, therefore, in contrast to the ruling of Lord St. Leonards in 1853, that the decision of Lord Loughborough on

the Glencairn claim in 1797 was binding, right or wrong, on the Committee for Privileges in the Montrose claim of 1853, Lord Chelmsford ruled that the Devon decision of 1830-1 was not binding on the Committee on the Wiltes claim, and, therefore, that Mr. Scrope's claim must be reported to the Crown as without foundation.

I may remark, in supplement to the preceding cases, that the House of Lords issued the Order of the 26th February 1875 in the recent Mar case upon the assumption that the speeches in Committee were to be imported into the Resolution—thus in contradiction once more to Lord Chelmsford's ruling in the Wiltes case in 1862, and in conformity to Lord St. Leonards's construction in the Glencairn case in 1797; but as it is now held, as I have reported in the debate upon the Duke of Buccleuch's Resolution, that the speeches are mere opinions, and do not form part of the Resolution, and cannot be imported into it, the Order in question and Lord St. Leonards's enforcement of the Glencairn speeches (not the Resolution) in 1797 against the Montrose claim, both fall to the ground. And so matters stand at present, and will stand—unless some counterblast from the desert flings the sand once more into confusion.

The effect of the principle which is thus identified with the Wiltes decision, viz., "That a Committee for Privileges is not bound in any way by the views upon which a previous Committee for Privileges has founded its report upon a claim involving the identical point of law and construction; but that Committees are entitled to consider each case upon its own merits, irrespectively of such precedents," is twofold,—on the one hand, claimants are delivered from the contingency of being defeated through crude opinions advanced in Committees for Privileges being enforced as judgments and precedents; and, on the other hand, they are deprived of all landmarks for guidance between the sunken reefs of Committees for Privileges in the House of Lords. But it is impossible to accept the attitude taken up in the Wiltes case as final, when we find the contrary principle acted upon and still enforced in the Order of 1875. The peril to which claimants of dignities are exposed by this series of blasts and counterblasts is one of utter uncertainty, with the miserable compensation that, if Committees for Privileges are

henceforward to be considered absolutely independent of precedent, "lords of themselves," although "a heritage of woe" to claimants, it is possible that they may relapse inadvertently into sounder views, and practically rescind and act independently of the reversals of accepted law which I have above specified, and even recognise judgments of the Court of Session as entitled to deference in Scottish cases—thus stumbling upon truth while wandering in error. But there can be no reasonable security for the vessel reaching the haven of success when the compass is without a needle, the chart on which the shoals and reefs of an intricate navigation was inscribed has been thrown overboard, and the blasts of every varying wind of gentilitial doctrine, the personal prepossession of noble and learned Lords as to what decisions ought to have been if past, and ought to be if in future, and how they can be so framed as appears to them through the spectacles of the nineteenth century, swell its sails and propel its course, irrespectively of fixed and adjudged law and precedent.

Looking at the position of the House of Lords, as affirmed by the Wiltes decision, we cannot but see that, feebly as the links have cohered of late years, an absolute break of continuity has now been effected in the tradition of the House of Lords as advisers of the Sovereign in peerage claims reported to them. They have cut themselves adrift, and must float down the stream. As in the times of anarchy before the institution of judges in Israel, every Committee for Privileges does as it seems right in their own eyes. It is hardly necessary to point out that confidence in the permanence of justice and fixity of principle in every court, whether of law, of arbitration, or of inquiry, must be abandoned, when such court divorces itself in this manner from antiquity and precedent. I well remember in the Montrose claim the confidence with which I anticipated the effect which the successive proofs must produce upon a tribunal which professed to be guided by the strict rule of priority of obligation in the enforcement of law—a confidence which Mr. Riddell largely shared, and apart from which would never have advised my father to embark in the claim. I remember too how that confidence gradually died away through intercourse with the English counsel and a nearer acquaintance with the practical working of Committees for

Privileges in such claims, till at last, when the final day of the speeches and the Resolution arrived, I went down to the House with pencil in hand, prepared to take note of the *rationes decidendi* in repudiation of the claim, and felt thankful, as the speeches proceeded, that the noble and learned Lords committed themselves step by step to the avowal of views, every one of which furnished a plea of remonstrance as against law and justice. What I felt very strongly, and what I feel now, was and is that we had been betrayed, practically betrayed, into the toils by our confidence that law and precedent, as established for instance in the Norfolk and Glencairn judgments of 1425 and 1648, would be respected by the Committee—precisely the same delusion which subsequently beguiled Mr. Scrope, the Wiltes claimant, into the false position in which his family have been placed through his and their confidence that the Devon precedent would be followed in his own case.

The reader will now see why I have taken these various cases in connection in reference to the present and pressing point of peril to the Peers of Scotland. I have invariably discouraged claimants who have consulted me as to the expediency of bringing forward their claims before the House of Lords, on the ground of the utter uncertainty what line any Committee for Privileges may take. I did so in the late Lord Kellie's case, but on the ground that the right of the heir-general was so clear by previous decisions that the House was bound to follow, as to give him no chance of success; but if my prognostication as to the suggested failure was wrong, it arose simply from that utter disregard for law and precedent which I had not calculated upon. All this is not as it should be in a court, whether of inquiry or of final jurisdiction, to which the most important subjects of adjudication, the dignities of the realm, are subjected. This, at least, is clear:—It would be madness hereafter for any claimant to advance a claim to a dignity by petition to the Crown without previously ascertaining, so far as it may be practicable, the probable leanings of the noble and learned Lords who may be expected to sit and advise the Crown upon the particular points which form the strength or weakness of the claim, while all retrospective references to the earlier rulings of Committees of Privileges, or, if such a

thought can be admitted, to the decisions of the Court of Session in a Scottish case, would be thrown away. Moreover, there is the risk always of a change in the law Lords who take the lead in Committees if a case be prolonged for some space of time.

Such, in fine, is the uncertain and unstable ordeal to which claims to perhaps the highest and most ancient dignities of Scotland are henceforward to be subject. The peril to the Peerage of Scotland cannot be over-estimated.

(6.) Peril is yet further to be apprehended, and of a formidable character, from a principle, the immediate birth of the supremacy asserted for the House of Lords in dignities, and which was initiated in modern times in the Montrose claim, viz., that a Committee for Privileges may report upon an apprehended claim in the negative before any claim has been advanced by the person against whom the Report is made,—this being with the view, it would appear, of precluding the possibility of the claim being advanced hereafter through petition to the Sovereign. The principle was originally asserted, or at least acted upon, by the House of Lords in the celebrated Banbury case in 1694, which nearly led to a conflict between the House and Lord Chief-Justice Holt, who negatived it in the Court of King's Bench as contrary to law,—a conflict which the House prudently withdrew from. Its revival after a dormancy of one hundred and fifty years in the Montrose case in 1853 was effected by the insertion of a clause (elsewhere remarked upon) in the Resolution upon that claim under the following circumstances:—

The Dukedom of Montrose was granted twice, as has been shown, to David Earl of Crawford, first by James III., by charter, 18th May 1488, and secondly by James IV., with advice of Parliament, 18th September 1489. The claimant, my father, claimed the dignity under the original charter; and cited the second grant as evidence affording proof, by acknowledgment of the Duke's political enemies, that his right under the original grant could not possibly fall under the terms of the noted Act Rescissory, and that as there had never been a break in the Duke's loyalty, and he had neither been attainted, nor had resigned the dignity (all which was fully admitted by the Committee for Privileges), the dignity must still be in his

heirs under the original charter in question. My father did not claim under this regrant by petition to the Crown, although holding that it was as effective to his right as the original charter; and he preferred holding his dukedom from the King who originally granted it as the reward of transcendent loyalty and merit rather than from the son of that King, who had been a tool in the hands of traitors who had murdered their Sovereign. Lord Crawford might have claimed under the regrant, but he did not; and no claim under the said regrant was before the Committee of Privileges as referred to for advice by the Sovereign. The Resolution as proposed by Lord Chancellor Cranworth at the conclusion of his address contained no allusion to the regrant; but after Lord St. Leonards had concluded his own speech, and was proceeding in his turn to propose the Resolution, a sudden thought appeared to strike him, and taking up a pen, he inserted the following clause:—"That the grant of the Dukedom made by King James IV. to the said David Earl of Crawford in 1489 was a grant for the term of his life only,"—not, doubtless, without assent from Lord Cranworth, but of course hurriedly given; and the noble and learned Lord re-read and proposed the Resolution, thus amended, with the rapidity of a flash of lightning,—but not so as to escape my eyes, watching the proceeding. The claimant had strongly protested during the discussion against any prejudgment of the question of right under the regrant; and, I must add, that in describing it in my Address to Her Majesty as "an afterthought," I felt compelled to submit the following comment:—"That an intention of including the regrant in the Resolution would appear to have been lurking in Lord St. Leonards's mind at a very early period in the proceedings, inasmuch as, at the conclusion of Sir Fitzroy Kelly's address on behalf of the claimant, Lord St. Leonards repudiated the idea of confining the consideration of the claim to the patent of 1488 and the Act Rescissory—in manifest contradiction to the views and understanding of the Attorney-General, of the Lord Chancellor, of Lord Brougham, and of the Chairman of Committees, Lord Redesdale—who appear to have been quite unsuspecting (as was the claimant likewise) of what was germinating in the mind of the noble and learned Lord. Lord St. Leonards's intervention was an act of illegality as

affecting the rights of a subject, and a distinct usurpation of the privilege of the Sovereign, and moreover a point-blank contradiction to the judgment of Lord Chief-Justice Holt pronounced when a similar step of *outrévidence* had been taken by the House in the Banbury case, and that upright, learned, and fearless judge laid it down that 'The Lords had not any cause before them.' This was only a petition of the Earl to be tried by his peers, the which was a matter of privilege of which they had cognisance; but the right of Earldom never was before them or submitted to their judgment. . . . This petition asserted him to be an Earl, he did not put that question before them, and therefore their sentence was more than they had before them to determine. . . . He demanded to be tried by his peers, and asserted himself to be a peer; and they answered that he had not a right to the Earldom of Banbury; the which was a thing out of the petition, and of which the Lords had not any jurisdiction."

The insertion of the clause in question in the Montrose Resolution was thus *ultra vires* on the part of the House, and illegal and a nullity. No case precisely similar has since occurred; but the principle thus established has been practically acted upon in the recent Mar case—through the issue of the Order 26th February 1875 excluding the heir-general, the lawful Earl of Mar, from his seat at the Peers' table at Holyrood, and placing Lord Kellie in his seat, on the ground that the heir-general had no right to the original earldom—Lord Mar having made no claim thereto by petition to the Crown, and the House thus having no authority to pronounce an opinion upon his right, or take action upon such opinion, as they confessedly did in fulminating the Order in question. The parallel of the Mar with the Banbury case is more close than with the Montrose; but the principle has been the same in all the three cases, private rights and the respect due to the Sovereign being equally disregarded in each instance.

It must be evident to the Peers of Scotland and to claimants of Scottish dignities that the ground may be cut from beneath their feet in the prospect of claims *in futuro* by recourse to the principle thus sanctioned by the House of Lords.

(7.) But perhaps the most portentous omen indicated by the

thunder-cloud which has gathered over Scotland—(my noble brethren may rub their eyes, and declare that the sky is clear, but it hangs there, black and palpable)—is the utter disregard manifested in the action of the House of Lords for generations past for the provisions of the Treaty of Union, by which the rights of the subjects within Scotland, peers not less than peasants, are protected. The utter oblivion of the Treaty of Union in the enactments of the Statute 10 and 11 Victoria, c. 52, originating in the House of Lords and carried through a careless and indifferent House of Commons, is a flagrant instance of this. I need not dwell upon the vast and common interests which all Scotsmen must have in defending the liberties secured to them by that Treaty. The peril in short to Scottish interests, and those particular interests of the Peerage which I am now dealing with, is the greater inasmuch as most people look upon the right of succession to peerages and all matters connected with dignities as matters apart from the general interest; whereas the right to a Scottish dignity rests on precisely the same ground as the right to landed or any other heritage; and a blow struck at the former—as, for example, in the superseding of the Scottish law and presumption of succession to the traditional rule and presumption of the House of Lords—cannot but be felt by the latter, and shake this security to the foundation. Noble Lords at recent elections at Holyrood have boasted that they were British Peers, entitled to have their rights adjudicated upon by the House of Lords exclusively,—confounding the privileges of a peer with the right to a Peerage—entirely distinct things.

(8.) Lastly, if all, or many, of the perils above enumerated may appear theoretic and visionary, the Peers of Scotland may take note that a very proximate suggestion of peril subsists in the single fact that injury of the most grievous and, at first sight, irreparable character has already been inflicted on the heirs to the dignities of Glencairn, Montrose, and Mar by the Reports of Committees for Privileges in the House of Lords upon these three cases:—In the Glencairn claim, injury to the heirs under the original and only patent or charter of creation, of 1488, whether heirs-male or heirs-general, whose claims to the dignity under the limitation in this charter are a point

open to discussion, but under either alternative have been ruthlessly blotted out; while the Resolution held forth an inducement to the heir-male to claim the dignity in virtue of a presumed creation under an imaginary patent, such as Lord Kellie claimed under in 1875, but the suggestion of which was repudiated by the Court of Session by a distinct interlocutor in the Glencairn case in 1648:—In the Montrose claim, injury to the heirs under the limitation in the patent or charter of creation of 1488, whether heirs-male or heirs-general, whose rights are thus, as in the Glencairn case, to all appearance defeated:—And, injury to the heir-general in the Mar case, whose rights to the Earldom of Mar, ranking as from 1404, have been overlooked and set aside, and the Earl of Kellie declared to be Earl of Mar in his stead, and placed in the seat and precedence of the ancient Earldom, to which he has made no claim or pretension—a seat in no possible sense his own. But if such injury has been inflicted on generations past and present, what, let the Peers of Scotland ask themselves, may not be expected in the future? For under the blighting influence of the innovations above noticed, and more especially of that on which I laid special stress in my Protest; the principle that the House of Lords has power to overrule the judgments of the Court of Session, and act according to their own rule of justice, or even expediency—a principle stretching its branches like an upas tree over the length and breadth of the land, no Peer of Scotland can tell where the next blast may not fall, whether on himself or on his family, or on his brother peers; inasmuch as there are few among us whose rights of precedence, if descendible, and even of simple recognition and existence, do not depend directly or indirectly upon judgments of the Supreme Civil Court, protected by the Treaty of Union; and these are now liable at any moment to be slighted or trampled under foot, as in the three cases above specified. Autocratic power, such as is virtually claimed for itself by the House of Lords, is incompatible with the claims of justice and right; these last must occasionally knock under. It is never to be forgotten that in the Glencairn, Montrose and Mar cases, the House of Lords, under the guidance of those who advise Committees for Privileges, have identified themselves with the position of the rebels against James III. and lawful authority

in 1488, of the opponents of the Erskines and of legal right from 1457 to 1565, and of the Parliament in rebellion after the execution of Charles I. in 1649. The assumption of absolute jurisdiction in 1879 can only be compared to that of the Parliament in 1649, when they attempted to annul a decret of the Court of Session, because it pointed the parallel between themselves in 1649, immediately after the murder of King Charles, and the Parliament of 1489, the first held by the murderers of James III. The Parliament of 1649 was unsuccessful; their enactments were rescinded at the Restoration. The House of Lords have been more successful now. What does such conduct augur for the future in Scottish dignities?

And thus I close this category of perils, from the consideration of which I shall now attempt to draw a practical conclusion.

### SECTION III.

#### *Disadvantages of the present usage.*

I shall be asked, Granting the existence of these perils, what remedy can there be? Can we expect the Legislature to interfere? would it not be a greater risk still to invite such interference? And who is the Bell-the-Cat to engage in such a crusade against prepotent authority, fortified by immemorial custom?—immemorial, indeed, only in the imagination of those whose recollection does not carry them back to the days of Lord Brougham and Lord Eldon, when the exclusion of the lay element from Committees for Privileges was first accomplished, and the usage of referring claims to dignities exclusively to the House of Lords had not been adopted by the Crown.

My answer to these questions is, that there is no occasion for legislation, nor for a crusade, nor even for a collision with the House of Lords—the remedy lies at our very door, and can give ground of offence to no one. My suggestion is of the simplest. Let those who prefer it, and are willing to run the risk, prefer their claims to peerages to the Sovereign personally, as has been done during the last hundred years; but let claimants to Scottish dignities return to the only constitutional and legal tribunal for the decision of such claims, viz., the

Court of Session ; acting, in a word, henceforward, in accordance with the law of the land, and the sanction under the protection of the Treaty of Union, instead of seeking an award by a roundabout course from an arbiter who no longer professes to judge, and is practically superseded by his assessors, like the Merovingian kings in their declining time by the mayors of the palace, although the comparison is imperfect, inasmuch as the mayors of the palace acted in the name of the prince till the last.

I may be allowed to repeat here what I have elsewhere said, that it is only by allowance on the part of claimants, and by consent of the Sovereign to act as arbiter, that such claims can by any possibility (consistently with legal and constitutional obligation) come before the Sovereign, and under an implied compact that the claims shall be decided according to the law of Scotland, which has not been observed by the Sovereign's assessor, the House of Lords. Yet it is said there is no appeal—the decision is final, irreversible, right or wrong. Where, therefore, shall Scottish claimants resort to, if not to their native tribunal, the Court of Session, in obedience, I repeat, to the law of the land and the Treaty of Union ?

It will not, I think, be denied that when claims are advanced, or interests are at stake, which are dependent upon the correct application of the laws of a particular country, and when the Court which sits in judgment is the supreme tribunal of that country, presided over by men conversant from their youth with the law, and with the precedents which must govern their decision, and applying that law under the immediate eye of their countrymen, legal no less than lay, the administration of justice under such circumstances of vantage may be expected to be more satisfactory than if the tribunal to which the questions are submitted is that of a foreign country, presided over by men who, however able and conscientious, have been trained in a different school of jurisprudence, and are unacquainted (as a rule) with the law and the precedents which could alone guide them to right decision. Yet this is the contrast between the Court of Session and the House of Lords, as it is now presented to us by the law Lords and the Report of the Select Committee as a court of supreme jurisdiction in Scottish dignities.

It is true that, acting as a court of appeal from the Court of Session, the House of Lords may (according to the system which has grown up in regard to such appeals) review a decision of the Court of Session. But this is only after full consideration of the judgments of the Lords of Session, which is a very different condition of things from the investigation of claims to dignities brought before the House by reference from the Crown, and with the merits of which they become acquainted only through the pleadings of counsel, without any aid from the judges of the Supreme Court of Scotland.

The contrast thus established in favour of a national as against a foreign tribunal is applicable *a fortiori*, now that the House of Lords no longer acknowledges itself a mere court of inquiry, unable to originate, but simply answering the questions of the Crown by Resolutions, which are the expression of mere opinions only, not judgments—as Lord Chelmsford laid it down in 1862, in accordance with ancient usage,—but has asserted an absolute jurisdiction, and acted in marked disallowance and supersession of the Sovereign in the background, as in the case of Lord Mar, so as to cut off all opportunity of remonstrance on the part of those interested, and preclude the Sovereign from pronouncing his award upon the question—as by the Order of the 26th February 1875. The contrast is between the Court of Session, with its Outer and Inner House, its *nobile officium*, and thirteen of the ablest lawyers of Scotland as judges, and a Committee for Privileges of the House of Lords, in which, on more than one occasion, three, or two, or even one noble and learned Lord has decided upon claims to the highest of all possessions, the right to peerage, under circumstances in which the proverb “Too many cooks spoil the broth” appears to have been preferred to the older and more highly sanctioned adage, “In the multitude of counsellors there is wisdom.” But the mischiefs of the current system cannot be gauged by any mere numerical standard.

So long as the Sovereign took a personal interest as judge or arbiter in peerage claims, taking advice where it could be best rendered—as George I. did, for example, from the officers of the Crown for Scotland in the case of the Viscounty of Kirkcudbright,—the objection to the system which has prevailed since the determination of the Lovat claim by the Court of Ses-

sion in 1730, and the suspense of the Oxenford claim in 1733, has been less objectionable ; because the ultimate authority of the Crown was still recognised, as by Lord Chelmsford in the Wiltes case in 1862 ; but the Order of the 26th February 1875, the assumption of a jurisdiction absolute and without appeal by the House of Lords, as the result of the debate on the Duke of Buccleuch's Resolution, and of which we have seen the last outcome in the speech of Lord Selborne reported in the preceding Letter, have signed, I may say, the death-warrant of that procedure by petition, reference, report, consideration, and award, which was, as I have shown, permissive and not obligatory on Scottish claimants, and which it was always in their power to refrain from resorting to in deference to the superior claim of the Court of Session under the sanctions of Scottish law and the Treaty of Union.

What I have thus stated in general terms may be appreciated more accurately when I point out the disadvantages under which the claimant of a Scottish dignity, or one defending his hereditary rights against one who assails them, is placed when appearing at the bar of the House of Lords, sitting as a Committee for Privileges. I speak from personal experience as well as observation ; and although successive generations of law Lords in the House may have possessed more or less of the knowledge requisite for giving an opinion upon a Scottish peerage case, and the *moral* of the Committee may vary according to that of its constituent elements, the picture I have so stated will not be found, I think, to be overcharged. It is with no disrespect to the House of Lords, or to its legal advisers in past or present times, that I sketch the constitution and procedure of a Committee for Privileges in fuller detail ;—apart from such a sketch, my plea for a reversion to the practice of earlier and better times would lack a very strong element of support.

It will be recollected, in the first place, as I have elsewhere observed, that the lay peers, who form the majority in a Committee for Privileges, have been reduced to the position of dummies, practically silenced, their votes being taken for granted as blindly assentient to the expressed opinion of the law Lords. There were disadvantages attending the less restricted system ; but there were advantages also, an illustration of which has been noticed in the fact that the recognition of the right of the

Cassillis heir-male to that ancient earldom was arrived at, as appears from Lord Hailes's Additional Case, on grounds consonant with Scottish law, through a majority of lay peers, influenced, I have little doubt, by the words of Lord Marchmont as against those of the law Lords, whose advice was grounded on a view of the law of succession absolutely contradictory to the law of Scotland, which they imported into the Resolution itself, as expressly worded for that purpose.

As the practice is now, the Committee for Privileges is guided exclusively by the law Lords. An exception has grown up in favour of one layman, the present Chairman of Committees, Lord Redesdale, in deference to his traditional knowledge of the practice of the House and experience in cases of peerage claims, and who gave his opinion or "judgment" on a parity with Lord Chelmsford and Lord Cairns in the recent Mar case. He filled the same office of chairman in 1853, on the occasion of the Montrose claim, and I have often regretted that he did not address the Committee on that occasion. I have ever felt grateful to him for the pains, the fruitless pains, he took to obtain a just consideration of various arguments and facts affecting my father's claim in that year. The number of law Lords in attendance varies; and while the Chancellor as a rule is always present, it seldom happens that all the other Lords are able to pay consecutive attention to the pleadings throughout, which in a case of intricacy is a very serious disadvantage. In the Mar case the attendance of Lord Chelmsford, Lord Cairns, and Lord Redesdale was, I believe, unremitted throughout the hearings.

The claim of a petitioner to the Sovereign for recognition as the tenant of a Scottish dignity, when referred to the House of Lords for their advice in the usual manner, comes before the House in the form of a Case drawn up by the claimant's Scottish counsel, but signed likewise by his English advocates. But, with two exceptions, Scottish counsel are not permitted by the House of Lords to plead at their bar; the claim must be advocated by English counsel, unless a claimant be fortunate enough to secure the service of one or both of the two law officers of the Crown for Scotland, the Lord Advocate and the Solicitor-General for Scotland. Those English counsel, if at the summit of their profession, and those who plead in peerage claims, are

usually overburthened with professional work, require in certain cases that the Case and evidence of the claimant shall be mastered in the first instance by counsel of less distinction than themselves, whose province is to “insense” them with the main points of the argument, and to act each as a “fidus Achates” to his Æneas. There have been many instances in which the English counsel have objected to the expositions of law which they were called upon to advocate, have struck out or altered passages in the original Cases, or taken their own line in advocacy, confident in their superior knowledge of what would be most effective with the law Lords before whom they plead—acting with the best intention for their clients, but at the risk of running upon sunken rocks, through their ignorance of the foreign sea they were venturing upon. The greatest possible consequence is attached to a counsel possessing the ear of the House; and when that is the case, the temptation to subordinate Scottish to English views is very strong with such leaders. Between the claimant and his Scottish counsel with his Case in his hand, and the Sovereign, the arbiter to whom he professedly submits his claim, there are thus a series of three transitional steps, each of which has a tendency to render the claim and argument indistinct—first, the English sub-counsel, or earwiggers; secondly, the English counsel themselves; thirdly, the English law Lords before whom the latter plead—for, as a rule, they are always English, and unversed, or only superficially versed, in Scottish law, and apt to regard it with contempt as compared with English. The tendency to dissipation and adulteration which Scottish doctrine is subject to through this transmission of intelligence, or rather this darkening of knowledge, is frequently aggravated by the extreme difficulty experienced by the claimant, or by his Scottish counsel, in getting the English counsel to take in, and adopt, and act upon the principles of Scottish law—opposed as many of these are to the private rules and traditions of the House, or to comprehend the constitution of the Scottish Parliament, Scottish courts of law, and Scottish feudalism generally—the system in which all the Scottish dignities are rooted. It was my own happy experience in the Montrose claim to meet with counsel who were willing to listen and capable of taking in the peculiarities of law so essential to the appreciation of a Scottish

case; but the prejudices to be surmounted were great, and the awe in which a great English pleader is held by his brethren in the profession is only second to that which many of those pleaders themselves entertain for the law Lords in the House—all this rendering the inculcation of a simple but unfamiliar point of Scottish law—a point upon which the whole case may turn—upon a Committee for Privileges a very difficult achievement. I am quite certain that in my own person nothing but a persistence which no ordinary counsel of inferior rank would have ventured upon, coupled with the indulgence with which my intervention was accepted, could have enabled my father's leading counsel to enforce the claim (for example) of the final decreets of the Court of Session upon the deference of the House of Lords, as of a Court supreme and without appeal in Scottish dignities, in the manner they did in 1853—although the two noble and learned Lords who advised the Committee for Privileges disallowed the argument, under a rooted preconception that it was impossible that the Court of Session could have possessed such a power!

The case being before the Committee for Privileges—the Scottish law on which the claimant stands, and which the legal luminaries of the House have repeatedly acknowledged they are bound to follow, expounded, attacked, and defended, all by English lawyers, and as such at second hand, we have next to consider who the law Lords are, the Chancellor and others who advise the Committee as to the Resolution. They are, with the rarest possible exceptions, English lawyers, untrained in the ancient feudal and peerage law of Scotland, which is to them a foreign code—which they hear of not unfrequently for the first time from the English counsel, instructed by the Scottish,—and predisposed by their habit of sitting on appeals from the decisions of the Court of Session to hold the decisions of that Court before the Union comparatively cheap and as subject to their own revision; while they forget altogether that they are not sitting in judgment upon the claim before them, and that they are merely members of a consultative body, commissioned by the Sovereign, *pro hac vice* in each case, to report to himself as the ultimate authority. With this prejudice to contend with, it is not to be wondered at that these men, so able, so honest,

so great in their proper department—who have usually attained to a comparatively advanced period of life, unfavourable to the assimilation of new ideas—and who are overwhelmed by multifarious occupations incidental to the exalted posts and personal influence due to approved ability—should find it impossible under these disqualifying circumstances to descend by patient study beneath modern and English prejudice to the fundamental principles which are binding upon a Scottish court of inquiry, such as a Committee for Privileges is in a Scottish claim. As matter of fact, they are dependent as a rule, for their knowledge of the Scottish law they have to administer, upon the pleadings of counsel—English counsel; and when, as not unfrequently happens, the counsel pleading before them is staggered by some unexpected question started, involving fundamental principles upon which his argument, or that of his opponent, rests—a fallacy perhaps in view, which he feels impotent to deal with—a difficulty which a Scottish feudal or antiquarian lawyer only could elucidate, they have to feel their way, often with marvellous instinct and sagacity, towards the truth, but often to be gravelled at the very threshold through simple deficiency in that knowledge (on the part alike of counsel and of themselves) which would overleap the difficulty, and which counsel, unprepared for the emergency, is not capable of supplying,—the miserable Scottish counsel and his client, unable to speak, fuming in the background. It is a sad exemplification of the old experience of the blind leading the blind, and both falling into the ditch. I need scarcely observe that the theory of the perfect judge implies a knowledge in him superior to that of the counsel pleading before him, so that between their arguments he is able to distinguish and affirm the truth; and when they fall into error, to correct them. But there can be no approach to this theory in the personality of the noble and learned Lords who practically preside in Committees for Privileges. Add to this, that as between Cases drawn up by Scottish counsel for Scottish claimants, some are drawn up by adherents of the orthodox, some by those of the heterodox, school of peerage lawyers, these latter adulterating or rather superseding the Scottish law by the introduction of the private rules of the House of Lords enforced since 1762, it would require a training and experience which the law Lords

cannot possess, to discriminate so as to do justice to the orthodox arguments.

It has been in consequence of this second-hand and imperfect character of the arguments addressed to Committees for Privileges, and of the confusion arising from the contradictory principles insisted upon by the partisans of the different schools referred to, that the learned advisers of Committees for Privileges have been encouraged to assume that there was nothing settled in the law of peerage in Scotland previously to the Union, and to form rules of their own, which they adopted and transmitted to their successors in the belief that there was no ascertained and solid ground to stand upon in Scottish law—a belief which would have been dispelled at once if they had ever even cursorily perused the standard institutional writers of Scotland, or consulted—which they were bound to do, according to the analogy of English procedure in dignities—the Scottish judges on doubtful points. But this they never did, and thus drifted upon shoals of error, upon which they built what they mistook for beacons of enlightenment, in the shape of rules and traditions which have led subsequent generations astray. What is most to be lamented is that neither in the Cassillis nor Sutherland claims, nor in the Montrose nor the Mar, where questions of the utmost importance arose upon the construction of Statutes, of legal decisions, and of the simple laws of Scotland, have Committees for Privileges ever sought the advice and guidance of the Judges of the Court of Session on the same principle that they have in various cases sought the assistance of the Judges of Westminster Hall in English cases of dignity. Had this been done, there cannot be a doubt that the House would have been spared from committing itself to the private rules of interpretation and guidance which they have now acknowledged themselves incompetent to originate, and which, therefore, sink into nothingness when confronted by the law of Scotland and the Treaty of Union.

The result then is that Committees for Privileges on peerage claims, and especially on Scottish claims, exhibit the spectacle—not of duly constituted courts of law, acting on principles of solidity and permanency, but of consultative bodies, shifty, nebulous, and erratic, without any assigned or permanent status in the firmament of justice—bodies which

hold themselves to be bound by no precedent or authority, claiming a "large" (I may say, an unlimited) "discretion," sitting loose occasionally even to their own precedents and traditions, so that there can be no confidence on the part of those who calculate on their consistency, when submitting their claims to their consideration, that the ruling of yesterday will be the same to-day, or to-morrow—autocratic in practice, if not in principle, and practically irresponsible—there lying, even under the most favourable view, no available appeal from the Resolution, inasmuch as, although the Sovereign may refer back a case for reconsideration (I speak according to the ancient understanding) either to the House or some other body, or may do that by personal and independent act which shall appear to be just and right in his eyes, still such intervention is practically impossible; and were it possible, it would be merely an appeal from one of the law Lords, the Lord Chancellor, sitting in the House of Lords, to the same learned Lord, the Lord Chancellor, as keeper of the royal conscience, sitting as it were in the royal antechamber, so that to count upon such an intervention or remedy upon an appeal from a Resolution of the House reported to the Crown would be a delusion. Moreover, the House has now repudiated any jurisdiction on claims other than their own—excluded the Sovereign virtually from the view of the claimant, and proclaimed itself a court of first and ultimate instance, its decisions final and irreversible, right or wrong—a Star-Chamber, in short, but without the presence of the Sovereign, who, according to English principle, is first, last, and everything in honours.

Such is the complication of disadvantages and disqualifications which places, in the first instance, the noble and learned Lords intrusted with the grave responsibility of advising the Crown upon peerage claims in a thoroughly false position, and deprives (as it will now be evident) the claimants of Scottish dignities of that protection and security to which they are entitled, not merely by the laws of their country, under the protective sanctions of the Act of Union, but on the broadest principles of universal justice and equity, and which security is absolutely dependent on a recognition on the part of Committees for Privileges of the law and practice in cases of Scottish dignities, and that reverent observance of the decisions

and precedents of the Court of Session, as binding on themselves, which they have now for many years repudiated. We have an illustration of the results in the present case of Mar, in which two noble and learned Lords, and a third noble Lord, the Chairman of Committees, have attempted, in perfect good faith, to undo what the Queen of Scotland, with full concurrence and co-operation of her Council and of the supreme civil court, the Court of Session, and approval and acquiescence on all sides till the present moment, did and carried through, in vindication of justice against one hundred and thirty years of oppression by the Crown and Government,—and to this effect, that if the Report be acquiesced in, Scotland will be deprived of her oldest surviving dignity—a dignity to which the nearest in approach on the score of antiquity is that of the De Courcys in Ireland, dating from 1171, while the earliest in England is of still later origin. Of the general ability, the personal integrity, and the desire to do justice, which have as a rule characterised the noble and learned Lords whose opinions on these claims not I, but the voice of Themis, sounding from distant ages, has denounced, there cannot, I again and again repeat, be a question; but the system has been stronger than the men.

It may appear presumptuous in me, a mere layman, to write all this; but my friend and early teacher, Mr. Riddell, held equally strong opinions as to the disqualifications attaching to claimants through the constitution of Committees for Privileges, and the inconvenience to a Scottish claimant of having to plead at second, nay in some cases at third, hand, and each of these English hands, before the House of Lords.

#### SECTION IV.

*Proper Remedy.—To resort to the Court of Session.*

The reader will now, I think, after perusal of this review, appreciate, as I have anticipated, the risks attendant upon claims to Scottish dignities preferred through petition to the Crown, and the absolute necessity incumbent upon them in self-defence, and more especially since the arrogation of absolute jurisdiction to itself in such claims by the House of Lords, to resort once more to the ancient judicatory peculiarly appro-

priate to the consideration of Scottish dignities—the Court of Session; in resumption of the usage which has been discontinued since the Lovat decision of 1730 and the wakening of the precedency question between the Earls of Crawford and Sutherland, involving the right to the latter dignity as between the heir-general and the heir-male, in 1746—a discontinuance solely imputable to the action of claimants, not to any *laches* on the part of the Court itself. The remedy lies at the very threshold of Holyrood.

The Court of Session, as contrasted with the Committee for Privileges of the House of Lords, is a Court of Scottish law, of unimpeachable jurisdiction, under whose ample dome causes are heard, and reheard, if necessary, on appeal, with the full attention and united wisdom of the entire College of Justice; and which, by a peculiar privilege, in birthright from its mother the law of Rome, and in necessary complement of that statutory independence which usage only (not law or constitutional authority) has impeached, is entrusted with the *nobile officium* of equity,—thus including every provision for impartial and sufficient justice.

That the Court of Session was a competent tribunal in Scottish dignities, without appeal to King or Parliament, till the Union, has been shown in a former Letter, and affirmed, to cite no other testimony here, by Lord Mansfield. The privileges of the Court were expressly reserved by the Treaty of Union. The Court sustained its jurisdiction in dignities, as I have there also shown, subsequently to the Union; and the Lord Advocate, Duncan Forbes, eloquently vindicated it in 1733. As no appeal lay to the Scottish Parliament before the Union, so no appeal lies to the House of Lords since; and if it were attempted to appeal to the House from a decision of the Court of Session upon a claim to dignity, on the ground that there is no distinction established between dignities and other heritage, the answer would be, first, that there is no precedent whatever for an appeal from a final judgment of the Court in a case of dignities, either to the Parliament before, or to the House of Lords since the Union, and that such power of review could only be bestowed upon the House of Lords by an Act of the Legislature, for the manifest benefit of the people within Scotland—the indisputable precondition to such enact-

ment; and even on the hypothesis that such an appeal could legally take place, the position of the claimant would be far more tolerable than under the present system, as the case would have been fully investigated by the Lords of Session by Scottish law before it was sent to the House of Lords. But there would be much to discuss before that could be thought of.

There would lie no question of constitutional difficulty in resorting to the Court of Session instead of the Crown in claims to Scottish dignities. It would be, in fact, as I have urged, a return to constitutional practice; for the Treaty of Union gives no sanction to any tribunal for such cases except the Supreme Civil Court of Scotland. It was admitted by Lord St. Leonards in his speech on the Montrose claim in 1853 that the Treaty of Union gave no sanction to any deprivation of the Court of Session of the right to judge in peerages, if they possessed the right previously to that Treaty, which he doubted, notwithstanding the positive evidence brought forward by the claimant on finding that doubt was entertained respecting a matter which ought to have been familiar to the humblest advocate dealing with a Scottish peerage claim. In his bewilderment at finding the law of Scotland and the traditions and prejudices of the House of Lords brought into opposition in the matter of the decret of the Court of Session in 1648, the noble and learned Lord asked, "How did this House get any jurisdiction in the matter of peerage claims?" The question well illustrates the *stratum* of feeling out of which the opinions delivered during the recent debate on the Duke of Buccleuch's Resolution and the previous pseudo-legislation of 1847 took their origin. "If it" (*i.e.* the jurisdiction), continued Lord St. Leonards, "existed before the Act of Union" (in the Court of Session), "why should it not exist now? Why should it not have remained?"—questions to which the noble and learned Lord complained in his speech to the Committee that he had received no answer, although the claimant had answered them categorically when the questions were originally put during the previous discussion—questions on his repetition of which Lord St. Leonards added, in that culminating hour, "There is nothing in the Treaty of Union to disturb the right and power of the Court of Session, if that Court really had the jurisdiction." To these questions and to this observation I myself replied afterwards in a paper

subjoined to my Address to Her Majesty, prefixed to my Report of the Montrose claim, and in which I gave full proof, not only how the Court of Session came to have been possessed of the jurisdiction in dignities, which I then asserted, and now once more assert for it, but how the right of pursuing claims to dignities by process before the Court, and the correlative right of the Court to adjudicate upon such claims, to the full extent of its statutory jurisdiction, in the present day, are not only not disturbed, but are protected by the Third, Eighteenth, and Nineteenth Articles of the Treaty of Union,—have been acted upon since the Union—and although in disuse and dormant, are not extinct, but may be called into living action at any moment by claimants to Scottish dignities. I venture to submit that it is most desirable that they should be so recalled; for, however soundly a Committee for Privileges may report on claims dependent on simple genealogical probaton, or where peerage law is the same both in Scotland and England, it requires a very different and specially trained tribunal to adjudge in cases where, as in almost all Scottish claims, the laws of Scotland and those of England, to say nothing of the private rules of the House of Lords, are at variance. Moreover, I must repeat, if there is one principle more evident than another in the constitution and practice of legal tribunals, as viewed at least by a secular eye—it is this: that the moral justification of the licence accorded to counsel in their presentments of law, or what they qualify as law, depends on the presumption that the judges before whom they plead are competent, by profound knowledge of the law which they administer, to expose fallacies, reprove misstatements, and place the due construction upon the facts, the evidence, and the law submitted to them for adjudication,—protecting the clients on either side from being placed at legal disadvantage; and that knowledge, to be profound, must be the result of careful training in that law, large experience in its practice from ancient times, and thorough acquaintance with and reverent observance of its precedents—qualifications which no foreign judges, trained exclusively in exotic law, can be expected to possess, and which certainly do not and cannot attach as a rule to the noble and learned Lords who advise Committees for Privileges on claims to Scottish dignities. I feel that the tendency of these suggestions is

to impose additional labour on the learned Lords of the Session ; but I misdeem of them much if they would be disposed to shut their ears to the suits of claimants of the ancient dignities of their country ; and from the peculiar training and traditions of the Scottish bar, especially of the orthodox succession, there can be little doubt that they would rapidly recall and apply with wisdom the principles and precedents appropriate to peerage claims as in force before the Union, as well as respect the judgments and maintain the *res judicatæ* in their integrity, which their predecessors have promulgated in such cases, based upon these principles.

That recourse to the Court of Session is, I may now add, peculiarly appropriate in the case of claims to Scottish dignities may additionally be shown by the consideration that it is by a misapprehension of the *status* of the peers and peerages of Scotland that claims to them should be submitted to the arbitration of any Sovereign, however wise and just, and however theoretically supposed to dispense justice. The Kings of Scotland expressly divested themselves, by the Act of Parliament constituting the Court of Session, of the prerogative of administering justice in dignities, as in other civil causes, delivering over all such right to the judgment of the Session, by which causes were to be decided thenceforward, in the usual phrase, "as accords of law ;" and the right of claimants to resort to the Session, and the correlative obligation of the Court to determine such causes, are included among those private rights which are protected by the Treaty of Union, as already shown. Moreover, if, as already stated, it has been by allowance of claimants that they have submitted their pretensions to the arbitration of the Sovereign, under the implied compact that they should be adjudged by Scottish law, it has been, by what must be considered as a personal concession on the part of the Sovereign, condescending to act as judge and arbitrator as if in a comparatively private controversy, that the Sovereign has determined upon such claims, irrespectively of the legitimate Court, the Court of Session. It has been, in fact, irregular from first to last, although sanctioned by custom, like the system, for example, of Scottish appeals to the House of Lords from the Court of Session : inasmuch as, since the attempt of Charles II. to resume the original judicial authority of the Crown

by an Act passed in 1681, and the annulment of that Act at the Revolution, "it is now," to quote the words of an acknowledged authority on the subject of the Court of Session, "unquestionable law, not only that the King cannot personally exercise the judicial power in the proper courts of the law, but that he cannot, without the consent of the Estates in Parliament, delegate a jurisdiction to any court different from those which have been used and established,"<sup>1</sup>—the effect of this being that the Sovereign cannot, and still less can the House of Lords, as assuming to inherit and supersede his jurisdiction, resume from the Court of Session the right of judging in claims to dignities, which his ancestor surrendered to the Court in 1532, and determine such claims by that judicial power which English custom (for Lord Chief-Justice Holt withholds the sanction of law) allows in such cases. There is thus nothing to prevent recurrence to the Court of Session; and I submit that it is by law, and by a legal tribunal, and as matter of civil right—and not as based on privilege in any sense nor adjudicable by a Sovereign or his delegates—nor as falling under the cognisance of the House of Lords in any shape, that Scottish peerage claims should be tried and determined—the resort thus suggested being a matter rather of legal obligation than of expediency, although most expedient, as I have above demonstrated.

There is much more that might be said on this interesting topic; but I have already said enough to suggest thought, which is what I chiefly aim at.

Lastly, I would submit that the Court of Session is the proper tribunal to which all questions arising upon claims to vote at Holyrood ought to be referred for settlement, and not the House of Lords. The right to vote, or determination on the right to a dignity, is a civil matter pertaining to the courts of law, and not to the House of Lords. The election of the Scottish Representative Peers is a matter privative to the Peers of Scotland, and as Lord Selborne said at the debate of 9th July 1877, the House of Lords has simply to accept the results of the election, not to preside over or interfere in the process. All questions of right to peerage or votes were decided by the Court of Session up to the date of the Union, and never by the Parliament or any section of the Parliament;

<sup>1</sup> Glassford's *Constitution and Procedure of the Scottish Courts of Law*, p. 93.

no power was taken away from the Court of Session by the Treaty of Union or conferred upon the newly-constituted House of Lords of the United Kingdom, either in this or any other matter affecting Scottish dignities. If it had been in contemplation that the House of Lords should exercise a controlling power over the elections, that would have been conferred at the time; but the temper of the Scottish Parliament at the time of the Union is a sufficient indication that it would have been useless to propose it. The very fact that the protests upon the Books of the Scottish Parliament, and transferred to those of the House of Lords in 1708, were protests for remedy of law at the hands of the Session, and that the House recognised their validity and the legitimate authority of the Court of Session in the case of *Sutherland v. Crawford and Erroll* as late as 1771, is a sufficient indication that all such questions were to be settled by the Court of Session, and that the Court of Session is the proper tribunal at the present moment. Again, the Lord Clerk Register, as appointed to preside at the elections and receive and register the votes of peers, has been subjected by no Act of Parliament to the dictation of the House of Lords, and is bound to act in accordance with the higher obligation of the laws and institutions of his country, as reserved by that Treaty which I am compelled to take my stand upon in this defence of the venerable Peerage to which I have the honour to belong.

I have previously pointed out that the powers alleged as having been conferred on the House of Lords by the Act of 1847—powers much more limited than supposed by the Select Committee of 1877—must fall with the Act itself, that Act being based on the assumption that neither the Crown nor the Court of Session has any concern in the subject-matter of the Act, and the Act proceeds from a Parliament precluded by prior obligation from enacting as it did—the Statute being thus null and void, as passed *ultra vires* of a Parliament *non habentis potestatem*.

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Thus, my dear Lord Glasgow, I have fulfilled the pledge I undertook, when engaging your attention to the foregoing

Letters in reply to Lord Kellie's address to the Peers of Scotland.

If the conclusions I have come to in regard to the lawful successor to the Earldom of Mar are at variance with those of Lord Kellie and the House of Lords, the test has been supplied in the declaration of the law of Scotland as given in the second Letter of the series. I put the question at the commencement, Which is to prevail, the law of Scotland or the private rule of the House of Lords? and the provisions of the Treaty of Union gave the answer. It was impossible for me to avoid treating of matters brought incidentally under my notice by Lord Kellie's Letter, more especially the Reports of the House of Lords in the claims to the Earldom of Glencairn and Dukedom of Montrose, and the general question of precedent as between the House of Lords and the Court of Session. The whole argument is now before yourself, the Peers of Scotland, and the public, and I submit it with confidence to the consideration of my countrymen. I end these Letters, as I commenced them, with a disclaimer of personal feelings, and a full confidence that I believe every one to have acted honourably and in a full conviction of being in the right. I claim the same concession as due to me from those against whose opinions and prejudices I have stood in opposition. It is time this protracted discussion should come to an end, and I take my leave accordingly with the expression of all respect due to your Lordship's high official position, and of the personal esteem and regard with which,

DEAR LORD GLASGOW,

I have the honour to remain,

Your obedient and sincere friend and servant,

CRAWFORD AND BALCARRES.

## APPENDIX.



## APPENDIX.

### No. I.

#### LETTERS BY LORD REDESDALE.

(1.)—From *The Times* of 6th July 1877.

LORD REDESDALE writes to us :—

“ In the observations addressed to you by Lord Crawford in *The Times* of Monday, he, in fact, denies the right of the House of Lords to determine Scotch Peerage claims. He assumes that the ancient Earldom of Mar is still in existence. The evidence before the Committee of Privileges has been held by the House to prove the contrary. He assumes that in Scotch Peerage cases the presumption is in favour of heirs-female. Lord Mansfield in the Sutherland case, said :—‘ I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir-male, always open to be contradicted by the heir-female upon evidence shown to the contrary. The presumption in favour of heirs-male has its foundation in law and in truth.’ I think most persons will consider the dictum of Lord Mansfield more to be relied on than that of Lord Crawford. From the death of the last heir-male in 1377, to the creation of Lord Erskine as Earl of Mar in 1565, there is no proof of any one being in Parliament as Earl of Mar, except under new creations to persons in no way descended from the old Earls. It is difficult to imagine any stronger proof of extinction. The placing of the Earl of Mar under the Decreet of Ranking is unquestionably erroneous. The date assigned to it was 1457, not 1404, as stated by Lord Crawford. It was not the date of the old Earldom, nor that of Queen Mary’s creation, though nearer to the latter than the former. All that the Duke of Buccleuch’s Resolution does is to direct that the title shall be called in the place proved to belong to it, and not in that which has been shown not to be the proper date of any Earldom of Mar. Lord Crawford’s assumption, that by the Decreet of Ranking a precedence

of 1404 was allowed, is for the purpose of making it appear that the Commissioners on that occasion accepted the charters of surrender and regrant of the territorial comitatus by Isabella in that year as proving that the honour went with the land. They, however, placed the Earl of Mar after the Earl of Errol, created in 1452, the Earl Marischall created in 1454, and the Earl of Caithness of about the same date, giving to Mar one of 1457. In refusing to recognise the peerage as being connected with the territorial comitatus in the person of Isabella, who was the heir of the last Earl of male descent, they must be held to have considered the ancient Earldom to have been extinct. It is impossible to imagine on what grounds they gave the precedence of 1457, when certainly there was not any Earl of Mar in existence. If they had had the evidence before them which was before the Committee of Privileges, they must have come to the conclusion adopted by the House in 1875. It was proved by that evidence that Lord Erskine sat as such in the Queen's Council in 1565, on the 28th of July, and on the 1st of August sat as Earl of Mar. The restoration of the territorial comitatus to him as heir to Isabella was on the 23d of June, more than a month before he became Earl. That the ancient Earldom was not restored to him was shown by his sitting at subsequent Councils as junior Earl. Further proof that he was created at that time on the occasion of the Queen's marriage to Darnley is to be found in a letter from Thomas Randolph, the agent in Scotland of Queen Elizabeth, to the Earl of Leicester, dated the last day of July 1565, giving an account of all that occurred at the marriage, in which he says, 'to honour the feast, the Lord Erskine was made Earl of Mar.' With this evidence before the Committee it was impossible to come to any other conclusion than that expressed by the Lord Chancellor, who said, in giving his judgment, 'I am of opinion that it is clearly made out that the title of Mar which now exists was created by Queen Mary some time between the 28th of July and the 1st of August in the year 1565. It appears to me perfectly obvious from every part of the evidence before us that in the greater part of the month of July and before that creation there was no title of Mar in existence.' The Resolution proposed by the Duke of Buccleuch only gives the necessary instructions to the Lord Clerk Register, in accordance with the decision of the House, following all precedents in such cases, and in no way prevents Mr. Goodeve Erskine establishing his right to the ancient Earldom of Mar at some future time if he can find evidence to prove it."

## (2.)—LETTER, EARL OF REDESDALE TO EARL OF CRAWFORD.

PARK PLACE, ST. JAMES'S, *May 19th*, 1879.

DEAR LORD CRAWFORD,—I have just seen your protest against Lord Mar's vote at the last election of a Representative Peer. Having given a detailed judgment in the Committee of Privileges on the case, I request your consideration of the following observations on your statements.

The origin of the ancient Earldom of Mar is lost in its antiquity. There is no record of its creation.

You state the law to be in such cases as follows :—

"The rule and presumption of succession in Scottish law is in favour of the heir-general, alike in lands and dignities, where no counter right can be shown by legal evidence in favour of the heir-male."

The Earl of Mansfield in the Sutherland case thus declared the law in regard to dignities :—

"I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir-male, always open to be contradicted by the heir-female upon evidence to the contrary. The presumption in favour of the heir-male has its foundation in law and in truth."

You will excuse me for saying that I consider Lord Mansfield's opinion on such a point of greater authority than yours.

The last male heir of the ancient Earldom of Mar died in 1377.

Since that date no person has ever been acknowledged in Parliament, either before or since the Union, as holding the ancient Earldom. This experience of more than five centuries affords conclusive proof that it is extinct in accordance with the law as laid down by Lord Mansfield.

Between the death of the last heir-male and the creation of Lord Erskine in 1565, at least three Earls of Mar were created, proving that during that period the ancient Earldom was held to be extinct.

You contend that John Earl of Mar was held by the Commissioners for the Decreet of Ranking to possess the ancient Earldom, thus stating his case :—

"In virtue of the documents produced by him (*i.e.* the charter of Isabella in 1404, and retours by which he was served her nearest lawful heir), the Earl of Mar was placed on the roll immediately after the Earl of Sutherland and before the Earl of Rothes, the Commissioners thus assigning him the date of the charter of 1404

as his proper place of precedence. The ranking of the Earl of Mar in the Decreet of Ranking cannot now be challenged in any court of the United Kingdom."

I am surprised at your making such a statement, which I will show by the clearest evidence to be incorrect.

The Commissioners did not give the Earl of Mar the precedence of 1404. You are right as to his having been placed before the Earl of Rothes (created in 1458). Your statement that he was placed next below the Earl of Sutherland is misleading. That Earldom did not in the Decreet of Ranking hold the high precedence allowed to it by the House of Lords in 1771. Both it and the Earldom of Mar were placed below the Earldom of Errol (created in 1452). I defy you to deny this. How then can you hold that the Commissioners gave the Earl of Mar the precedence of 1404? Surely you must know that in all Scotch Peerage lists the date allowed to it has been 1457.

There can be no doubt that Lord Mar endeavoured to obtain a report from the Commissioners in favour of his claim to the ancient Earldom, and it is equally clear that they declined to do anything that could be held to support it. Refusing to give him a precedence founded on Isabella's charter of 1404, they thereby declared that they considered that the ancient Earldom became extinct on the death of her grandfather, the last heir-male, and that she had not inherited the peerage-earldom with the territorial comitatus dealt with in that charter. It is absurd to say that in allowing a precedence of 1457, they acknowledged the existence of the ancient Earldom. I hold that the selection of that precedence was to prevent any such assumption. They took that date because there was then an Earl of Mar in Parliament; James the Second having before that period so created his third son, who died without issue in 1479. Thus they connected the precedence they gave Lord Mar with an Earldom, to which no Erskine could at any future time make out a claim, and as that peerage was extinct no one was injured by their so connecting it. If they had taken a date when there was no Earl of Mar in Parliament, they might have been held to admit that he had a claim to a dormant title, which could only have been the ancient Earldom. By allowing him the precedence of 1437, they made him a worthless, because unfounded grant in no way connected with the ancient Earldom, and this decision of the House of Lords has declared this.

I shall be much obliged to you for a reply to these observations.—Believe me, my dear Lord Crawford, yours very sincerely,

REDESDALE.

## No. II.

DEBATE ON THE MOTION OF THE DUKE OF BUCCLEUCH  
RELATIVE TO THE EARLDOM OF MAR.*House of Lords, 9th July 1877.*

DUKE OF BUCCLEUCH.—My Lords, I rise to move the Resolution of which I have given notice, namely, that “This House doth order that at all future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peers of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating in his name, do call the title of Mar in the Roll of Peers of Scotland called at such elections, in the place and precedence to which it has been declared by the resolution and judgment of this House on 26th February 1875 to be entitled, according to the date of the creations of that Earldom, and in no other place, with a saving nevertheless as well to the said Earl of Mar and Kellie as to all other Peers of Scotland their rights and places, upon further and better authority showed for the same.”

My Lords, I will not enter into the controversy which has been raised between the rival claimants to the Earldom of Mar, nor will I detain your Lordships by travelling through the interesting details connected with the recent contest for that ancient Earldom. At the death of the last Earl of Mar some few years ago two claimants appeared to the title; one of them was the Earl of Kellie, and the other Mr. Goodeve Erskine. They put forward their claims on different grounds and under different circumstances. It is not my intention to enter into a discussion of that matter. The case was heard by the Committee for Privileges of this House, and the proceedings extended, I believe, over several days. The Committee for Privileges were assisted by counsel on both sides, who produced at the bar upwards of 500 documents, charters, and writs. It was then decided by the Committee for Privileges, whose decision was afterwards ratified by the House, that the Earl

of Kellie had made good his claim to the Earldom of Mar, which was created by Queen Mary in 1565, and that Mr. Goodeve Erskine had not made good his opposition to that claim. Now, my Lords, what is usually done under those circumstances by this House? When a peerage case is decided in favour of a claimant, it is usual for an order to be sent at once from this House to the Lord Clerk Register in Scotland, to insert that peerage according to its proper place in order of date on the roll of the Peers of Scotland, which is called at the election of Representative Peers. That has been done on several occasions. I have a list here of those peerages which have been so inserted at different times. I will not weary your Lordships by reading the list of those peerages, but it shows that some have been entered which are not to be found on the Union Roll.

But before I enter upon that I may say, with regard to the Union Roll, that a great misconception prevails as to what that Roll is. It is not embodied in the Act of Union; neither is it to be found in the Treaty of Union. It is a copy of the great Roll that used to be called daily in the Parliament of Scotland when the House was sitting. It was, I think, in May of the year 1707 that the Act of Union was passed, and about the end of that year an order was sent from this House to the Lord Clerk Register, directing him to send up an authentic list of the Peerage of Scotland as it then stood. That was in December 1707. My Lords, in March 1708, the list was sent up to this House, and was referred to a Committee of this House, who reported upon it, and the House accepted it as an authentic list of the peerage as it then stood. The peerages were entered in it according to the precedence given them by what was called the Decreet of Ranking of 1606, which was not a final Decreet of Ranking or precedence; it was styled an "interim" decreet. It was open to any Peer who thought himself aggrieved as being put too low, or who thought that he was not put in his proper place, to reduce that decreet. This was done in the case of the Earl of Buchan, who brought before the Court of Session his case for reducing the Decreet of Ranking, because he was put below sundry Peers, and the case was decided in his favour, and that decision was confirmed and ratified by an Act of Parliament passed by the Scottish Parliament in 1633. I mention this, my Lords, because it is an instance showing that the Decreet of Ranking was not final.

Moreover, peerages have been added to the Roll since the Union, the names of which are not to be found in the original list. Lord Dingwall was added in 1714; Lord Colville of Culross and Lord Somerville in 1723; the Marquess of Queensberry in 1812; Lord Polwarth in 1835; the Marquess of Huntly in 1838;

Lord Herries in 1858 ; and Lord Kinloss in 1868. I do not mention other peerages which have been, I should say, rather restored to the Roll than added to it, namely, peerages which had been under an attainder which was reversed.

My Lords, the motion which stands in my name is a resolution that the Earl of Mar may be placed by the Lord Clerk Register in the Roll, according to the date assigned to the peerage, by the judgment of this House, the judgment of this House bearing that the peerage dated from the time of Queen Mary in 1565. Any person who will take the trouble of looking at the Decreet of Ranking, could have no hesitation in saying, that the position of the Earldom of Mar upon that Roll is erroneous. If, as is asserted by a noble Lord whom I do not see in his place here, the Earl of Crawford, it is as old as the year 1014, it is a very extraordinary thing, that in the Decreet of Ranking, the Earl of Mar was put below the Earl of Crawford, for the Earl of Crawford of that day was one of those very Peers who were present at the making of that Decreet of Ranking. The Earl of Mar is put in the Decreet below the Earl Marischall, and the date of his peerage is 1457 or 1458 ; that shows that the Decreet must have been wrong in that respect. I should say with regard to this Roll which was sent up by order of the House of Lords, the Court of Session gave this explanation of the Roll which they sent up ; they said that the only document they could find was a sheet of paper without signature, and without date, but it was what was believed to be the Roll. I happen to have what I believe is very rare now, a copy of the printed list of the Scottish Peers supposed to have been called by the Clerk of the Parliaments, and there I see the Earls appear in this order : Crawford, Erroll, Marischall, Sutherland, and Mar. Many a time at elections of representative Peers I have heard the different Peers protesting against other Peerages being called before their names. At the very last election the Earl of Morton protested against the Earl of Mar being called before the Earl of Morton.

All I ask your Lordships to do is, to send an order to the Lord Clerk Register, according to the precedents of former times, directing him at all future meetings of the Peers of Scotland, for the election of Representative Peers for Scotland, to call the title of Mar in the place to which it has been declared by the Resolution of this House, on 26th February 1875, to be entitled, according to the date of its creation, and in no other place, and then, my Lords, there follow these words, "with a saving nevertheless as well to the said Earl of Mar and Kellie as to all other Peers of Scotland, their rights and places, upon further and better authority showed for the same." This would not interfere with

any other peerages which either are in existence or may be created. If any gentleman claims the ancient Earldom of Mar, and can prove his title to that peerage, there is nothing to prevent his claiming it, and if he has the power of proving his claim there is nothing to interfere in any way whatever with his doing so. My motion only relates to the peerage which has been adjudged by this House to be held by the Earl of Kellie.

MARQUESS OF HUNTLY.—My Lords, I think it is a matter of regret, that upon a subject affecting Scottish Peerages there should be any division of opinion in your Lordships' House. But I think I have an apology for opposing the noble Duke on this occasion in the arguments which he has himself brought forward; for, if there had not been two sides to this question, he surely would not have entered into any controversial matter in proposing the plain resolution which he has submitted to your Lordships. He has gone, to some extent, into a historical sketch, dating from 1606 to 1875, but that historical sketch, if he will allow me to say so, bears two sides, and I think I shall be able to put another view of the case before your Lordships upon the present occasion.

My Lords, I venture to move the previous question to this resolution, and I do so upon one ground, which I think is important, namely, that the resolution is *ultra vires* of your Lordships' House. (Hear, hear.) Before following the noble Duke in his historical sketch, I will take this exception, that this petition is not, as is usual in cases of petitions of the same sort, a petition to the Crown. I believe there is hardly an instance of a petition of this sort not having been a petition to the Crown, and referred by the Crown to your Lordships' House. This is a petition presented direct to your Lordships, and I take that objection to it as a preliminary objection.

Now, my Lords, the noble Duke has referred to the previous cases. I have looked through those previous cases, and I have here a return to your Lordships' House, which it is rather difficult to get, showing all the peerages which have been added to the Union Roll since the date of 1707. I find, my Lords, that there is not a single instance among the seven peerages which have been added of a peerage having been struck off the Union Roll, on which it stood at a certain date, and having been inserted at a date later than that at which it originally stood. The noble Duke mentioned a number of those peerages, but he left out two of them. I will not go through them again, but I can say safely, without contradiction, that in every instance when one of those peerages was inserted upon the Union Roll of Scotland, and a vote as a Representative Peer allowed in respect of it, the peerage was either in abeyance at the time when the Union Roll was made up,

or it was a peerage which has been altogether added to the Roll since that time. There is no instance of a peerage having been struck off the Union Roll and added at a later date than that at which it stood in the original Roll.

My Lords, the noble Duke said, and said correctly, that the ranking of the Earldom of Mar on the Roll was after 1457, and I would wish here to join with the noble Duke, and to say that I do not desire to enter into any controversial point as to Mr. Goodeve Erskine's claim, or that of the Earl of Kellie. I only wish to bring the matter before your Lordships' House as a matter affecting the privileges and rights of Scottish Peers. Now, my Lords, the Decreet of Ranking dated in 1606 was a decreet issued by Commissioners appointed by King James I. of England, who inquired into the standing of all Scottish Peers, and I maintain that it was a judicial decree of very great importance—indeed, of very much greater importance, I think, than the noble Duke seems to attach to it. That Decreet, dated 1606, fixed the Earldom of Mar at about 1457. My Lords, the Peer whom it is proposed you should allow to vote at the election of Representative Peers of Scotland, dates his peerage from 1566. Is it in accordance with common sense to suppose that a Decreet of Commissioners carefully inquiring into the matter only forty-one years after the creation of a peerage in 1565, should actually put down that peerage as of 1457? I think, and I believe the majority of your Lordships will agree with me, that there must have been men living in Scotland at the time of the making of the Decreet of Ranking who were fully aware of what Queen Mary did with regard to a creation of the Earldom of Mar in 1565. If so, I am surprised that no mention is made of the matter, but they distinctly, in the Decreet of Ranking, put down the peerage, as the noble Duke said, as of the year 1457. (Hear, hear.)

But, my Lords, there is a more important point still arising upon this Resolution, and it is this—I do not know whether the noble Duke is aware of it—this Resolution proposes to strike the old Earldom off the Roll, and to call the Earl of Mar in his new place; in fact, it puts a fresh Earldom upon the Roll of the Lords of Scotland, but it also allows another Lord Mar, if he likes to come to your Lordships' House, to claim the ancient Earldom. You might have Lord Mar coming to this house next year and claiming to be put back according to the Decreet of Ranking upon the Union Roll as dating from the year 1457.

Now I will call your Lordships' attention to another rather important point. Two years have elapsed since this question was brought before the Committee for Privileges. It was decided in February 1875 that the Earl of Mar and Kellie had proved his

right to the title, the origin of which was placed in 1565. Two years have elapsed since then, and most Scotchmen, I think, supposed, as I did, that the whole matter was done with; but after an interval of two years, it is brought forward again in your Lordships' House in the form of a resolution. Surely the proper thing would have been to have moved a resolution confirming that decision of the Committee for Privileges very shortly, say within a month, after the decision was pronounced by the Committee. Why have two years been allowed to elapse before this question has been brought before your Lordships' House? My Lords, I say that such a long time has elapsed that if anything was to be done there should have been a petition to the Crown, as is, I believe, universal in all cases connected with Scotch peerages, and it should have been referred by the Crown to this House. After the manner in which the matter has been settled, there certainly should not have been a petition presented to your Lordships' House direct.

Now, my Lords, this is a matter which not only affects the two claimants to the title of Mar, but it is one which also affects very deeply every member of the Scottish Peerage. Your Lordships are aware that they are a very small and limited body at the present time. I only hope, that if no other good arises from this discussion in the House, something may come of it in this way, that perhaps the attention of your Lordships may be called rather more prominently than it has been of late years (although the matter has been brought before your Lordships' House in another form) to the case of Scotch Peers, and perhaps the long-suffering of Parliament may allow all those who have a right to call themselves Scotch Peers to sit in your Lordships' House. (Hear, hear.) Limited as they are in number, they hold peerages of an earlier date than 400 Peers of England. Therefore, I say, in passing, that if no other good arises out of this discussion it may perhaps lead to our getting what we claim as our rights, namely, seats, as Peers of Scotland, in this House.

My Lords, this is a matter which really affects the Scottish Peers themselves in a very keen manner. We were admitted as Peers of Great Britain by Parliamentary authority under the Act of Union. Now, I think that any resolution brought before your Lordships, which proposes to strike off any Peer, dating from the fifteenth century, to whom a seat was given by that Act of Union, is one which should be passed with very great caution. I say, in the first place, that this resolution is *ultra vires* of your Lordships' House, and I say further, that you should proceed very cautiously indeed before you tamper in any way with a Scottish peerage of very ancient date, which was fixed by the Decreet of Ranking as

of the year 1457, and which was acknowledged at the time of the Union between England and Scotland as such ; you should consider very carefully before you strike that peerage off, and substitute in its place a modern peerage. I say that it would be contrary to the spirit which ordinarily governs your Lordships to do so, and I say that it is contrary to precedent. That, my Lords, is the reason why, without entering in any way into the controversy as to who is the Earl of Mar, I have taken the liberty of moving the previous question to the noble Duke's resolution.

EARL OF REDESDALE.—My Lords, the first question raised by the noble Marquess is, whether the mode of proceeding in this matter ought to be by a petition to the Crown. Now it is not a matter with which the Crown has anything to do. The House has come to a Resolution which has been submitted to the Crown as to the placing of the Earldom of Mar. The petition of the noble Earl is that the House shall, according to the custom in all cases where a date has been assigned to a peerage of Scotland, order the Lord Clerk Register to call the peerage as of that date. That is a matter perfectly within the jurisdiction of the House. It has been done on numberless occasions, and it is the reasonable and the only right course to be pursued in the matter.

The noble Marquess says that we are asked by this resolution to strike a peerage off the Roll. The resolution does nothing of the sort ; it only says that a peerage shall not be called as of a certain date ; and why ? Because it has been most clearly proved that there is no peerage of that date in existence. There never was an Earl of Mar sitting in 1457. By some ingenious arrangement which does not appear, at the time the Decreet of Ranking was made up, the Earl of Mar was put in at that date ; but there was no Earl of Mar then in existence. It is a thing that we cannot very clearly understand or comprehend certainly, but the Committee for Privileges inquired into the matter, with evidence before it which was never brought before the Commissioners who framed the Decreet of Ranking, or any other tribunal, and determined that the first Lord Erskine who ever sat as Earl of Mar took his seat upon a particular date, namely, 1565. That was the Resolution of the Committee for Privileges, and that was the award of the House, and that has been the order of the House.

Now, what is really the ground which has been taken up ? Look at that statement which appeared in the newspaper from a noble member of this House. As he is not here, I may mention him—the Earl of Crawford. What is the distinct ground upon which he goes ? It is that this House has no jurisdiction to determine anything about Scotch Peerages. Is the House going to submit to such a principle, or to admit such a claim as that ?

This House has always held, and properly held, that it is the only tribunal to determine the right to a peerage. The proposal of the noble Marquess, namely, that upon this question, which is a simple one according to order and precedent, the House should be held to declare that it has no jurisdiction in the matter, seems to me, my Lords, to be one of the most extraordinary propositions that ever was made.

Then the noble Marquess says that this resolution would order a peerage to be put back. It amounts simply to this—that having found the Peerage to be of a particular date, we order the Peerage to be called as of that date. There was another claim put forward by a person who did not nominally come forward as a claimant, but as an opponent, and that was that the Earldom did not date from 1565, but from a much earlier period. He could, however, show no ground for it, and the decision was that that was the only date of the Earldom of Mar. And why? Because from the time when the last heir-male died in 1377 down to 1565, there was no person sitting as Earl of Mar who could claim in any way whatever to have any descent from the ancient Earls of Mar. The House came to the conclusion, therefore, and naturally, that there was a new creation at the time when the first of the Erskines came in. But I do not enter into the question whether that decision was right or wrong; it was the decision of the House. The only thing that is now asked of the House is—in accordance with that decision—to order the name to be called in the place which that decision has given to it.

The noble Marquess says that that ought to have been done at once. I wish it had been done at once; perhaps it should have been part of the original order of the House. But he says, after two years, why is it done now? Why is it done? On account of the scene of confusion and trouble which took place at the last Peerage election in Scotland, when a person came in who had been declared and adjudged by this House not to be Earl of Mar and voted as Earl of Mar. Under these circumstances it becomes necessary that the House should take care that that circumstance should not occur again, and therefore it is proposed that the House should come to a Resolution that the Earl of Mar shall be called in the place which was adjudged to him, and not be called in any other place, there being no person who has shown any right to be called in any other place. And now if Mr. Goodeve Erskine wants to come forward and make good his claim to be Earl of Mar, and if he can adduce evidence that will satisfy the House that he is entitled to what he claims, the House must give it in a very different place from that in which the Earldom of Mar stood upon the roll—namely, of the date of 1457. He could not come

in in that place, for he had no claim to come in in that place. He must come in at a very much earlier period, which is what is meant by all those who talk about the very ancient title of the Earl of Mar.

Now, my Lords, looking at the objections which have been raised to the proposal of the noble Duke, I do not see how it is to be met. It certainly has not been met yet. I should like to know what grounds there are which would justify the proposition of the noble Marquis, that this House has no right to order a peerage which is found on the Roll at a particular date to be called at another date. What objection can any man take to the Resolution by which that is proposed to be done? It seems to me that the natural consequence of the Resolution to which the House came in 1875—namely, that the placing, and the only placing, of the Earldom of Mar was in 1565—is that it must be called in that place, and that to call it in any other is improper. I defy anybody to find any good reason for saying that the places of the Peers on the Roll can never be altered, and that therefore the House cannot, upon further inquiry and upon fuller evidence, come to the conclusion that the placing of the Earldom of Mar at the date of 1457 was wrong, and that it ought to be called in another place. That is all that the House is asked to do. It is asked to act in accordance with the resolution which it came to in 1875, as to the place in which that Peerage should be called, and at the same time to order that it shall not be called in another place, because no one else has proved, and I believe no one is capable of proving, that it ought to be called in another place.

EARL OF MANSFIELD.—My Lords, the noble Lord has spoken of precedents. There is no precedent whatever of any Scotch Peer having been put into a lower place on the Union Roll. There are precedents for persons being put up, but there is no precedent whatever for a person to be put down on the Roll, and although we all bow with great deference to the opinion of the noble Earl, the Chairman of Committees, I defy him, and I defy anybody, to find such a case.

With regard to the motion of the noble Duke, and his observations in support of it, it has not been a question between “rival claimants to the Earldom of Mar,” for in point of fact there were no rival claimants. There was a claim made by Mr. Goodeve Erskine to the Earldom of Mar of 1404, and there was a claim made by the Earl of Kellie to a different peerage. Some years ago, Mr. Goodeve Erskine claimed to vote at an election of Scottish Peers. I was not present at the time, but I believe he voted on that occasion, and his vote was received as being the lineal descendant of the former Earls of Mar. Having taken proceedings

in the ordinary way before the Sheriff of the county, he was afterwards served heir to the late Earl, and he still retains his Earldom of Mar, and every Scottish Peer in this House is in exactly the same position. The noble Duke himself, and every other Peer of this House, knows perfectly well that in Scotland you have not to go through any form or ceremony whatever—you are merely retoured heir to your peerage and you take it; you do not come to this House for it. It is in that position that the Earl of Mar stands at the present moment; and although in the first instance he was opposed by the late Lord Kellie, who claimed to be Earl of Mar of 1404, that claim was dropped, and his son took up the position that he imagined a peerage, or somebody imagined it for him, of the year 1565, and the Committee for Privileges came to the conclusion that he had proved his claim to a peerage of 1565; but they never said one word about the peerage of 1404, therefore that peerage remains intact at the present moment.

My Lords, the decision which the Committee for Privileges came to in that case, appears to me to have been a most extraordinary one, because it was a decision that there was a peerage of 1565 which nobody had heard of before, and which has no scrap or tittle of evidence of any kind to support it. There is no patent or document of any kind which can be produced to prove that there ever was that creation in 1565. However, the noble Lords who sat on the Committee for Privileges chose to find, for some reason or other, I do not know what, that there was a peerage at that time created by Queen Mary, although this is inconsistent with the recital of an Act passed not long afterwards by the Scottish Parliament.

Now, my Lords, the whole foundation of this supposed creation in 1565 rests upon a very curious matter. There is a letter from a man of the name of Randolph, who, as your Lordships will remember, was employed between Queen Elizabeth and Queen Mary. In the postscript of that letter he says that the Earl of Mar was made on such and such a day—the day before the marriage of Queen Mary and Darnley. My Lords, I have looked through the evidence given upon this claim, and I find that that letter was struck out—that it was not allowed to appear in evidence, and Lord Chelmsford said—(I beg the noble Lord's pardon, I did not know that he was in the House or I should not have mentioned him)—he said: "This is mere gossip," and, "the evidence had better been rejected." That letter having been rejected by the Committee for Privileges, it is rather a curious thing that my noble friend the Chairman of Committees, in giving his opinion, refers to it as that which decides the whole matter. This Mr. Randolph, who was sent by Queen Elizabeth, was

rather in the position of what was called in these days "Our own special correspondent,"—(laughter)—and there ought to be just as much importance attached to him as is attached to a special correspondent in the city of St. Petersburg who sends to the newspapers here an account of a great action taking place between the Turks and the Russians, in which the Turks lost 3000 men and the Russians lost 40. I say that as much importance, and no more, ought to be attached to the one as to the other.

My Lords, I pass on to the next point. The Committee for Privileges having come to this decision, which took place on the 25th of February 1875, there was not very much time allowed for considering, because on the very next day, the 26th February, a resolution was moved in this House that the report should be approved of, and a singular thing has happened in connection with that—I do not know whose fault it is. When the House comes to a resolution of this kind, they generally report to the Queen, and take the Queen's pleasure upon it, but it is a very curious thing that that very night the Order was sent down (whose doing it was I do not know) to the Lord Clerk Register to insert the name of the Earl of Mar in the Roll at the date of 1565.

Then we come to the time when the extraordinary meeting for the election of Scotch Representative Peers took place. When the Lord Clerk Register was going to call out the Union Roll, as he always does, the poor man was very much puzzled, because he was told by the House of Lords to call the Earldom of Mar as of 1565, but when he came to the Union Roll it was not there; and on the one side he was told, "You must call the Earldom of Mar in the precedence in which it has always existed," and the other side said, "No, you must call it where the House of Lords has directed." Thereupon there arose protests which were put in on the one side and on the other, and some persons, of whom I was one, said that we voted for Lord Kellie. I said I did not vote for the Earl of Mar, because that was my opinion. I never shall vote for him as the Earl of Mar, or consider him the Earl of Mar myself.

Now, my Lords, with regard to the Decree of Ranking, this is one of the most solemn Decrees that ever was passed. About the year 1605 it was found that there were so many disputes among the different Peers as to how they ranked, that all public business was defeated, because at the beginning of a sitting they were always fighting as to where they should sit. In order to put an end to that, the King ordered a special inquiry to be instituted. That inquiry extended over several months, and every Peer was obliged to put in whatever evidence he could in order to establish his right to his peerage. The proceedings show that there were

a great many Peers who were not able to bring their proper documents, because they were either lost or stolen or burnt; from a great many of them they had been stolen. Therefore the only thing the Commissioners could do was to fix the ranking according to the documents produced. Upon that examination the Commissioners reported to the Sovereign, and the Sovereign, with the advice of the Council, passed a solemn Decree of Ranking, which Decree has always been held to show the rights of the different Peers. There was a reservation, however, to this effect: if at any time any Peer considers himself aggrieved, or thinks that he is able to produce documents which prove that his Peerage is of an older date than that at which it is placed in the Decree, then he may be permitted to have the Roll amended in that manner, upon establishing his case—not that any Peer should be able to put him down lower, but that he might be able to put himself up higher. (Hear, hear.) That is the manner in which the rights of the Peers of Scotland stood with regard to the Decree of Ranking.

Now this is rather remarkable with reference to the Earldom of Mar. We all know that the old Earldom of Mar is the most ancient in Scotland; but the Lord Mar in 1606 was not able to prove that, because the old charter was lost. However, Selden, in his book of “Titles of Honours,” mentions the Earldom of Mar as being the oldest that was known, and says that he had seen the original charter granting the earldom. This charter was lost, but curiously enough it is said to have been found quite recently in the course of a search for other papers at Lincoln’s Inn. The original charter of the Earldom of Mar of 1090 is said to have been found. Whether it has or not I cannot say, for I have not seen it, but it is evident that it is possible that the case may arise of an Earl of Mar claiming the title of Mar as of the date of 1090, because by a provision in the Decree of Ranking, the Earl of Mar would be able to go up higher, although no Peer can be put lower.

Now, my Lords, that being the case, what is the proposition which is made at the present moment by the noble Earl on my right? He proposes that you should strike out the Earldom of Mar at the date of 1457, and insert it at a later date as an Earldom of Mar of imaginary creation by Queen Mary; but for what reason that is to be done, except it is that they have got into a mess with their orders, I do not know. The Committee for Privileges made an unfortunate report; they came to what I consider a most erroneous conclusion, supported by no facts whatever. I have no doubt the noble Lords who came to that conclusion took great pains with the case. They must have taken immense pains, because to give a judgment when all the facts are

against you must be a difficult thing to do. There was one circumstance with regard to the judgment which I think it necessary to notice, and that is, that it seems to me very curious that the Committee did not consult their legal advisers upon the law of Scotland. If they had done so, although they might perhaps have come to their decision, they would certainly never have said that one thing which proved it to be right was, that although Queen Mary's charter was dated the 23d of June 1565, it was not until the 1st of August in that year that Lord Mar took his seat, and, therefore, he could not have sat under it. Now, my Lords, this was a territorial title, and everybody in Scotland knows that it requires a month or more to make up your titles and get infeftment. These proceedings are not known to English Peers, but they are known to all of us, because we succeed to our property in that way. The process is very much more rapid at the present time, but that was the case when I succeeded to my property, and this being a territorial peerage, that accounts for the delay which took place between the 23d June and the 1st August. The fact that Lord Mar did not sit in the meantime as Earl of Mar is no difficulty at all in the case. Why, my Lords, I myself, after I succeeded to my grandfather, sat and voted in this House for months after I became Earl of Mansfield upon a peerage of a separate creation. Therefore, what has been said of the Earl of Mar in 1565 might just as well have been said of me, because I was sitting under another title.

Now, my Lords, with regard to the point of the noble Marquess, as to how far the House has the power of altering the Roll, I think you would be proceeding *ultra vires* in ordering the ancient Earldom of Mar to be struck out. My Lords, up to the present time the House of Lords has always considered the Union Roll as part and parcel of the Act of Union, and has attached to it the importance and authority which attach to the Act itself. The question has been asked, What can be done? The only thing which could have been done, would have been to have referred the matter to the great tribunals in Scotland, not to any tribunal in this country. Whether or not it might have been considered by your Lordships that this was a case within the jurisdiction of the Scottish Court of Session I know not; but I have carefully gone through the whole of this question, and there is one thing which presses very much upon my mind, and that is, that the opinions of the Attorney-General, Sir Richard Baggallay, and of the Solicitor-General for Scotland, Mr. Millar, now Lord Craighill, were adverse to the conclusion at which the Committee arrived, but in defiance of that advice the Committee for Privileges came to the conclusion they did. Therefore, there were lawyers on the one side, and there

were lawyers on the other side, and I suppose that no one will dispute that Sir Richard Baggallay and Mr. Millar were very well qualified to form and to give an opinion upon the question.

I trust that your Lordships will not pass the Resolution which has been moved by the noble Duke.

LORD SELBORNE.—My Lords, I do not propose to follow the noble Earl who has just sat down, in the observations he has made as to the grounds of the decision adopted by this House in 1875. We are all very well aware that both before that decision and afterwards there had been various persons who have entertained a different opinion upon the merits of the question, but your Lordships I think will hold, that it having been determined in one particular way by a resolution of your Lordships' House, that is a determination which, so far as it goes, is binding upon your Lordships, and that this discussion must proceed upon that assumption.

My Lords, having said that, and therefore not going at all into the question whether the decision of 1875 was right or wrong, I must submit some reasons which make me think that, whatever else your Lordships may deem it right to do, you cannot either with prudence or propriety adopt the resolution offered to you by the noble Duke. There are two reasons which I will endeavour to explain to your Lordships for not doing so. The first is, that, as I understand what the effect of that Resolution would be, it is in the first place not really consistent with what was resolved by the House in 1875, and in the second place, if it were carried, it would, instead of supporting and fortifying the authority of what was then done, tend as much as anything could do to destroy and to throw discredit upon it. That is the first reason which I will endeavour to explain to your Lordships against adopting this resolution. The other is, that I think your Lordships ought to be most careful of inquiring into a matter of this sort, and into all the precedents and the laws affecting peerage, before you assume a jurisdiction which, as far as I am aware, there is no ground for saying that you have ever hitherto exercised. My Lords, I will endeavour to explain these two objections to the vote which we are now asked to come to by the Resolution of the noble Duke.

The noble Duke in the first place affirms that the Resolution and judgment of this House on the 26th February 1875 has declared the dignity of Mar to be entitled to a particular precedence, according to the date of creation of that earldom, which the Resolution of the House says was in 1565. My Lords, I do not so read the Resolution which the House arrived at on the 26th of February 1875. That Resolution, after affirming that the peti-

tioner, Lord Kellie, had made out his claim to the dignity of Earl of Mar created in 1565, and ordering that Resolution and judgment to be transmitted to Scotland, proceeded to direct this: "That at the future meetings of the Peers of Scotland, for the election of a Peer or Peers, the Lord Clerk Register do call the title of the Earl of Mar according to its place in the Roll of Peers in Scotland called at such election." That was a very different thing indeed from saying, as this Resolution does, that it shall be called according to the date of the creation of the Earldom. And, my Lords, I not only say that the natural meaning of those words is that it should be called according to the actual place which it had upon the Roll, but I may appeal to what has just now been said by the noble Earl the Chairman of Committees, who has virtually admitted the same thing, because he says it was a pity that what is now proposed was not done at that time. (Hear, hear.) Of course, if the words which I have read meant the same thing with what is stated to be their meaning in the noble Duke's Resolution, it was done at that time. But, my Lords, the words mean quite a different thing: they mean the place which that Earldom had and was entitled to upon the existing Roll of Peers.

And now, my Lords, I will give a reason for what I have said, that the authority of your Lordships' decision, instead of being supported, would be really impeached and impugned if this Resolution were to be adopted. Although no doubt the decision of the House of Lords does not in that respect embody the grounds of the judgment delivered in the Committee for Privileges, yet as a matter of fact we all know, and we have been told so this evening, that the real ground upon which the Committee for Privileges proceeded was that in 1565 there was no Earl of Mar existing of earlier date than that period, and that the ancient Earldom had not been restored by the means which, down to the date of that decision, had always been supposed to have had the effect of restoring it. Therefore the decision asserted virtually, though not in form, that there was only one Earl of Mar, and that there had been only one Earl of Mar since 1565, and that was the holder of the Earldom created in that year. But upon the Union Roll and the Roll of the Peers of Scotland there always had been an Earl of Mar standing, and therefore the place of the Earldom of Mar (if there was only one) upon the Roll of Peers was its existing place upon that Roll, and not any new or different place.

The number of precedents which the noble Duke mentioned, in cases where new rights of peerage had been established, or where peerages had been restored after attainder, which were not on the Roll before, and were then ordered to be put upon the

Roll, are no precedents whatever for taking away from an existing peerage, which the principle of the decision determined to be the only existing peerage at that time, its actual place and precedence, whatever that might be upon the Roll. The Resolution of 1875 merely said that that place was to continue the place, and the present Resolution would not affect that. My Lords, as I understand this Resolution, and as it has just been explained to your Lordships, it does not direct a change of the Roll—it does not direct the erasure of the existing title of Mar from its existing place upon the Roll and the introduction of that same title in another place; but it proposes that the Lord Clerk Register should be directed to call the title of Mar in the place and precedence to which it would be entitled according to the date of the creation of that earldom, that is 1565. The more ancient peerage would rank in the earlier place upon the Roll, which this resolution does not alter, and the effect, therefore, of the resolution would really be to introduce a second Earl of Mar into the Roll, leaving the original Earldom in its old place, and in that way to encourage instead of repelling the idea that there were two Earls of Mar. Anything really more destructive of the authority of the decision of 1875, I, for my own part, cannot conceive.

Well, my Lords, I proceed to say what I said before, that it appears to me to be a question of a very grave and serious importance whether your Lordships have any such right to interfere with the existing precedence upon the existing Roll of Scotch Peers, Mar or any other, as this Resolution claims. There may, possibly, be precedents for it; none have been produced, because no precedent has been referred to for changing by a Resolution of this House the precedence upon the Rolls of any existing peerage which stands there. But of course, if there are such precedents, some inquiry ought to be made after them, and with a knowledge of these precedents we should be on safer ground in taking any particular course. I must say that my inquiries, so far as I have been able to carry them, lead me to entertain a most serious doubt whether it would not be against the spirit of Acts of Parliament upon the subject for your Lordships to assume any such jurisdiction.

Now the position of the matter is simply this. The precedence of the Scotch Peers was settled by King James VI. in the year 1606, and I have extracts from the Commission and the letters of the King at that date. The King says that the Peers were to have the precedence which the Commissioners might assign to them, that all persons were to give them that precedence, and that they were to have it on all occasions, subject only to a power which was reserved, not to the House of Lords

of Scotland (if there had been such a power, it might perhaps have descended to this House after the Union), but to the Court of Session in Scotland, to rectify that precedence, if it was in any respect erroneous, upon the complaint of any person aggrieved by it. The noble Duke has stated that in at least one instance that has been done. The Earl of Buchan, who was put too low, did, in the reign of Charles I., take proceedings in the Court of Session, and did get a decree to give him a higher precedence. But it was thought fit that that decree should be confirmed by an Act of Parliament of Scotland, and it was so confirmed by an Act of 1633, showing how high a respect the Parliament of Scotland paid to the roll of precedence as it was settled by the Commissioners of King James I., and how necessary they thought it to fortify, even by Statute, any alteration of that roll.

My Lords, nothing would, in my judgment, be more unsafe for your Lordships than to take upon yourselves the office of rectifying any errors, if errors there be, in the actual ranking of those Peers. For instance: the Duke of Sutherland is also Earl of Sutherland, and if the old title of Mar is out of the question, I believe I am not wrong in saying that that is generally understood to be the most ancient earldom in Scotland, and it was established in the person of the Countess of Sutherland, the great-grandmother of the present Duke, by this House, upon the footing of that being so. My Lords, the Earldom of Sutherland is not in its proper place according to that decision upon the Roll of the Earls of Scotland. It stands below, I think, at present two, and formerly more than two, other Earls of more recent creation. Why that is, whether it is, as the noble Earl who spoke last has suggested, because the evidence brought before the Commissioners who inquired into the ranking was imperfect, or for what other reason, I cannot tell; but it would be a very dangerous thing if your Lordships were to take upon yourselves by a vote of this House to rectify the precedence of the Earl of Sutherland, and, upon the petition of the noble Duke who bears that title, to order that that Earldom should be called before the Earldom of Crawford, which precedes it. But your Lordships might just as well do that as do what you are asked to do now, because the result of the exercise of your judgment in the matter is, that it may be that the Earldom of Mar has been put in too high a place upon the Roll. If so, so has the Earldom of Erroll and the Earldom of Crawford; and I do not know why your Lordships are to rectify that error, if error it be, in the case of the Peerage of Mar more than in the case of the Peerages of Erroll and Crawford.

And, my Lords, further than that, if we are to go into the regions of conjecture, I do not know that it is an impossible thing,

even upon the assumption which I am bound to make, that Queen Mary did create a new Earl of Mar in 1565—I say that I do not know that it is an impossible thing that Queen Mary might have given to the Earl then created a higher precedence than that which he would have had according to the date of his creation. The truth is, that your Lordships are invited to enter upon a field which does not belong to your jurisdiction at all, and to take a step which, so far as I can see, is in no way whatever involved in or justified by the Resolution passed in February 1875.

My Lords, I pass from that, and I will now ask your Lordships to consider what is the authority of the Union Roll which you are asked, without any precedent, as far as I know, to alter. My Lords, it has a very high authority indeed, for in the preamble to an Act passed in this House in 1847, it is thus described: these are the words of the preamble:—"Whereas an authentic list of the Peerage of the north part of Great Britain, called Scotland, as it stood the first day of May 1707, was returned to the House of Lords by the Lord Clerk Register for Scotland, attested by him, pursuant to an Order of the House of Lords the 22d day of December 1707, and entered into the Roll of Peers by Order of the House of Lords on the 12th day of February 1708, to which list sundry Peerages of Scotland have since been added by Order of the House of Lords at different times, which list of the said Peerage is called at the election of a Peer or Peers to represent the Peerage of Scotland in the Parliament of the United Kingdom." Then it goes on to make certain enactments, which I shall presently refer to, as showing that when it has been thought necessary to interfere with the manner of calling peers prescribed by the Act of Union, it has been thought proper to give that power by Act of Parliament.

Now, my Lords, this title of Mar is one which has been enrolled and registered by the House ever since the Act of Union. It is one which stood on the Roll at that time as it stands now in the precedence given to it by the Decreet of Ranking, in which precedence the Earl of Mar sat in the last Parliament of Scotland, and indeed always sat from 1606 in every Parliament of Scotland; and your Lordships having determined that that Earldom was merely created in 1565, are surely not now going to take away the precedence which for more than two centuries the Earls of Mar enjoyed.

My Lords, I proceed to consider what has been the view hitherto taken in this House as to the exercise in this sort of summary way, of authority with regard to the Scotch Peerage and its elections. I find that on several occasions this House has acted, and the manner in which it has acted is very instructive.

In the last century it desired to have a revised Roll of the Peerage of Scotland, with the omission of attainted peerages and the addition of any which had been inserted since the Union—I mean claiming to which had been established. What course did it take? It sent to the Court of Session in Scotland to return a revised Roll, which the Court of Session accordingly did. I have a copy of the revised Roll here. Some inconvenience had been found to arise from persons tendering their votes at the election of Scotch Peers whose right to vote was very doubtful and controverted, and this House passed a Resolution which a good many years afterwards was rescinded *sub silentio* upon the motion of the noble Duke opposite (the Duke of Buccleuch). That Resolution was to the effect, not that the existing Roll was to be in any way interfered with, but that upon the descent of a peerage, if it was claimed by any collateral more remote than a brother, that claim was not to be admitted at the elections until it had been established and approved by this House. That Resolution was undoubtedly adopted, but it has been rescinded at the motion of the noble Duke, I suppose because there was a fear that it would interfere unduly with the privileges of Scotch Peers.

In 1822 a Select Committee of the House was appointed to inquire into the subject, and that Select Committee recommended that the House should assume a considerable authority, that it should direct the Lord Clerk Register to make out a new Roll, omitting those peerages which had not been called for a certain time, or which, if called, had been objected to, and to do certain things, into the detail of which I need not enter. But the House did not think it right to assume that power, and what the House did was to let the matter sleep for some years, and then in the year 1847 an Act of Parliament was passed. And, my Lords, it seems to me that if I read to your Lordships what is provided by that Act and the subsequent Act of 1851, your Lordships will see that you would be going very clearly against the mind of Parliament which passed these enactments, if, without reference to precedent to justify it (and if there are such precedents it would be desirable to see them), you assume the power which the noble Duke now asks you to assume. That Act of Parliament, after reciting what I have read concerning the Union Roll called at elections, went on to enact, first, that no peerage should be called in right of which no vote had been received since the beginning of the century; and, secondly, “That if any vote, or claim to vote, in respect of any title of peerage on the Roll called over at any such meeting shall be disallowed by” this “House, upon any proceeding had in trial of any contested election, the House of Lords may, if they shall think fit, order that such title of peerage shall

not be called" until some right to it shall have been established. But here, without anything in the Act of Parliament to warrant it, we are asked to order that the title of Mar now standing in the Roll shall no longer be called as it stands there. The third enactment was, that all protests made at such elections should be transmitted to this House, who might, if they thought fit, inquire into the questions raised by such protest, "and if they should see cause, order the person whose vote or claim has been so protested against to establish the same," under the same rules as apply to the case of ordinary claims. A protest has been made in this case.

Then, my Lords, there is this power given by the Act of Parliament: "That whenever any Peer shall have established his right to any peerage, or his right to vote in respect of any peerage, and the same shall have been notified to the Lord Clerk Register by order of the House of Lords, the said Lord Clerk Register, or Clerks of Session, shall not, during the life of such Peer, allow any other person claiming to be entitled to the same peerage to take part in any such election, nor shall it be lawful for the said Lord Clerk Register or Clerks of Session to receive and count the vote of any such other person, till otherwise directed by the House of Lords." My Lords, that certainly seems very carefully to guard the rights of persons who, even after a claim has been allowed, and even during the lifetime of a person whose claim has been allowed, make any persistent claim to the same peerage; they may not take part in the election until it is otherwise ordered by the House of Lords.

Then in 1851 there is a further enactment which says that the Lord Clerk Register "shall transmit to the Clerk of the Parliaments the titles of any peerages called at such meeting, in right of which no vote shall have been received and counted for fifty years then last past, or for any longer period, and on receiving an order from the House of Lords to abstain from calling such title at future meetings for such elections, it shall not be lawful for the said Lord Clerk Register or Clerks of Session to call such title at any subsequent meeting, or to administer the oaths to any person claiming to vote in right of such peerage, or to receive and count the vote of any such person, or to permit any such person to take part in the proceedings of any such election until otherwise directed by order of the House of Lords." There, again, the power is carefully guarded.

My Lords, the most careful and anxious way in which these provisions have been made, by Parliament giving this House particular powers with regard to calling titles upon the Roll at the elections of Scotch Peers, and, as far as I can see, not giving

any such power as the noble Duke now proposes, leads me to the conclusion that it is at least exceedingly doubtful whether what the noble Duke asks your Lordships to do is within your legitimate powers; and I put it to you whether anything could more tend to discredit the decision which was come to two years ago than that your Lordships should take a course not clearly justified by precedent, and not clearly within your constitutional powers.

LORD CHANCELLOR.—My Lords, I cannot avoid thinking that the Resolution which the noble Duke has placed upon the paper brings your Lordships into a position of considerable embarrassment. My Lords, the particular form of the Resolution has been somewhat altered since in the first instance notice was given of it, and whereas, as it stood originally, it appeared to be a Resolution directing the Lord Clerk Register to call the Earldom of Mar at a particular place in the list, and at no other place, the Resolution, as it now stands, adds to that order a saving of the rights of all the Peers of Scotland to whatever may be their proper places “upon further and better authority showed for the same.” I own that the qualification introduced by this saving appears to me to make the Resolution less objectionable than it was in its original form; but at the same time I cannot but think that, even in its altered and ameliorated form, your Lordships, by assenting to it, would run the risk of doing what I feel certain your Lordships would only do by inadvertence, namely, under the guise of passing a Resolution, really make that which would be a judicial, or if not a judicial, a legislative declaration.

Now, my Lords, I say that the danger of this Resolution would be that it would be either a judicial or a legislative act, and I say that for this reason: Your Lordships’ Committee for Privileges was occupied two years ago with the question of the claim to the Earldom of Mar. I recollect very well the investigation which then took place. It extended over a great length of time, and it raised some of the most difficult questions which, in regard to the tracing of peerages, can well be imagined. My Lords, I had the honour of attending the Committee, and I concurred in the Resolution at which they arrived. At the same time, I do not remember any case which ever occasioned me more anxiety, or in which one’s sympathy was more enlisted on behalf of the claimant who did not succeed before your Lordships’ Committee. That gentleman had been supposed to be the person entitled to the Peerage of Mar. He had been accepted as such, I believe, by all who were related to the family, and among the rest, by that particular family who afterwards became his antagonists for the title. They had received him as the proper heir to the older title, and it was in that

position, that, after holding it for some years, he found himself opposed by those who had in the first instance admitted his claim. My Lords, notwithstanding that, after the most careful and patient investigation, your Lordships' Committee for Privileges were of opinion that Mr. Goodeve Erskine had not substantiated his claim to the Earldom of Mar, and, on the other hand, that Lord Kellie had made out his claim to an Earldom of Mar, which, according to the judgment of the Committee, had its origin in the year 1565.

My Lords, that conclusion having been arrived at by the Committee for Privileges, and confirmed by your Lordships' House, I apprehend is conclusive for all purposes in this House; and I was somewhat surprised to hear not long ago the noble Earl who sits upon the cross benches (the Earl of Mansfield) set at absolute defiance the conclusion at which the Committee had arrived, and the conclusion which had been confirmed by this House. My Lords, it is not the custom of your Lordships to admit arguments which would be in direct opposition to a decision which the House has already come to, and therefore I do not follow in any way the views which the noble Earl takes upon the subject of this decision; but what I do submit to your Lordships with some confidence is, that we ought to be very careful not to go beyond what the decision actually was.

Now, what the decision actually was of course appears upon the record of your Lordships' House, and upon the order which was made by your Lordships' House upon the report of the Committee. This is the order which was made by your Lordships: "That at the future meetings of the Peers of Scotland, assembled under any Royal proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings in such election." Your Lordships will observe that this order is entirely affirmative. There is nothing whatever in it which is negative, and the affirmative order of the House is that the Lord Clerk Register call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland. My Lords, whether that means according to the place of a peerage created in 1565, or whether it means to leave the Lord Clerk Register at liberty to judge for himself what the precedence of the earldom may be, I do not stop now to inquire. That is a matter which must be considered in some other form, and cannot be decided upon a Resolution now passed by your Lordships' House. But what I do submit to your

Lordships is, that this having been the order of the House, the order of the House having been in its form merely affirmative and having no negative words in it, it would be entirely reopening the decision which was arrived at if you were to pass this resolution ; it would be supplementing it with that which is not the natural corollary of that which has been ordered by the House, but is something entirely different—something very much further and very much higher in its operation ; and therefore it would be doing what I took the liberty of saying at the outset your Lordships in this view of the case were asked to do, namely, under the shape of a Resolution of this House to pronounce a judicial decision affecting rights of peerage. That is my first reason against accepting this Resolution.

My Lords, my second reason is one which has been adverted to by my noble and learned friend (Lord Selborne). It is quite clear that if your Lordships, not being now satisfied with the affirmative order, which was an order passed as such orders are passed, as a matter of course, upon every report of the Committee for Privileges, should pass a negative order, that is to say, an order directing the Lord Clerk Register to call the Earldom of Mar in another place, the effect of that undoubtedly will be that you will be doing what, so far as I know, has never, with one exception, which I will explain, been done before—you will be affecting the Union Roll of Scottish Peers.

Now the Union Roll of Scottish Peers is a document which has a certain authority ; I do not mean to say that it is an infallible document, or one which can in no way be altered by authority, but it is a document which, as my noble and learned friend has correctly said, is declared to be of authority by an Act of the Legislature—the Act of 1847. The way in which the authority of the Union Roll is there mentioned is very remarkable. It is called “An authentic list of the Peerage of the north part of Great Britain, called Scotland, as it stood the 1st day of May 1707, was returned to the House of Lords by the Lord Clerk Register for Scotland, attested by him pursuant to an order of the House of Lords.” And then we are told by this Act of Parliament that to that list “sundry Peerages of Scotland have since been added, by order of the House of Lords, at different times.” There is nothing mentioned here of subtractions from that list, or of alterations in the precedence given by that list. It stands as an authentic list, made in an authentic manner, and returned in an authentic manner to this House ; and, as far as we know, by this Act of 1847 nothing has been done affecting it, excepting in the way of adding from time to time those peerages, rights to which have been determined by this House.

But that being so, what did the Act of 1847 do? It seems to me to be a very strong expression of the view of the Legislature that if anything was to be done to that Union Roll it was to be done by legislative authority, and not merely by a vote of the House, because it gave the House the power (and if the House had the power already, why should that power have been given to it by Act of Parliament?) to order a name not to be called upon that Union Roll. It did that in this way: "If any vote, or claim to vote, in respect of any title of peerage on the roll called over at any such meeting shall be disallowed by" this House; that is to say, disallowed after a certain protest had come before them, and after the persons who had claimed the right to vote had been called before the House, and the cases heard; if, after that was done, any vote or claim to vote shall be disallowed by the House of Lords, the House "may, if they shall think fit, order that such title of peerage shall not be called over at any future election." If, under those circumstances, this House comes to a resolution of that kind, then, under the power of this Act of Parliament, an order may be transmitted to the Lord Clerk Register that he is not to call the name, and then he is not to call the name.

Your Lordships have acted upon the authority created by this Statute; for, if I remember rightly, although I have not the case here at this moment, a very few years after the Statute was passed in the case of the title of Colville of Ochiltree, the House acting under the Statute, and having returned to it a protest which had been handed in at a contested election, sat in judgment upon it, called the parties before the House, decided that the claimant who claimed to vote as Lord Colville of Ochiltree had no right, and passed a resolution that the title of Colville of Ochiltree should never be called again, and ordered the Lord Clerk Register to act accordingly.

Now, my Lords, if it was necessary to have an Act of Parliament to order that this should be done, and that it should be done only in those special cases, it seems to me that your Lordships would be in very great danger of assuming a legislative power if you were to do now by this resolution of the House what it was supposed in the year 1847 required the authority of an Act of Parliament. (Hear, hear.)

My Lords, those are the reasons which make me certainly hesitate, and advise your Lordships to hesitate, before accepting the resolution of the noble Duke. My Lords, I think the most satisfactory mode of dealing with the question would be this,—and perhaps the noble Duke would be satisfied to withdraw the resolution he has proposed, with a view to my proposing this resolution; if not, I shall propose it as an amendment: That your

Lordships do appoint a Select Committee to consider the matter of the petition of the Earl of Mar and Kellie, and the precedents applicable thereto, and to report thereon to the House. If there are any precedents of which I am not aware, they will be considered by the Committee. It is clearly a subject of such gravity and importance, that I think it would be more satisfactorily dealt with by your Lordships after you had the report of a Select Committee.

LORD DENMAN.—My Lords, I must say that it seems to me, that for this House to bind itself to any particular decision by Resolution would be an unfortunate step. I feel perfectly sure that the claimant will have justice done to him, and if ultimately his case should come on appeal before this House, there are a sufficient number of your Lordships who take an interest in it larger than an ordinary Committee for Privileges, to do justice between the parties. The noble Marquess opposite has moved the previous question, but I think it would be preferable to agree to the appointment of a Committee to consider the subject.

DUKE OF BUCCLEUCH.—My Lords, after the speech of my noble and learned friend on the woolsack, I beg to say that I am quite willing to withdraw the Resolution which I have moved, and to assent to the course which has been suggested by him.

MARQUESS OF HUNTLY.—I have moved the previous question.

LORD CHANCELLOR.—The noble Duke has stated his wish to withdraw his motion. If the Resolution of the noble Duke is withdrawn, the previous question will fall with it. If, on the other hand, the House is not in favour of the withdrawal of the motion of the noble Duke, then the noble Marquess would be in a position to move the previous question.

*The question was then put and agreed to : That the motion (of the Duke of Buccleuch) be withdrawn.*

The Lord Chancellor having moved the appointment of a Committee,

LORD DENMAN.—My Lords, there has been no notice given of any such motion as that which has now been made by the noble and learned Lord on the woolsack, and I do not think we ought to proceed in the matter without notice.

*The question was then put and agreed to : That a Select Committee be appointed to consider the matter of the petition of the Earl of Mar and Kellie presented on the 5th of June 1877, and the precedents applicable thereto, and to report thereon to the House.*

No. III.

DEBATE ON MOTION OF MARQUESS OF HUNTLY.

*House of Lords, 11th July 1879.*

MARQUESS OF HUNTLY.—My Lords, as the recent election last spring of the Representative Peers of Scotland is the first election that has taken place since the appointment of a Committee of your Lordships' House to inquire into the Earldom of Mar, I think that I need not apologise for bringing a question which arose at that election before your Lordships, and making a statement and asking questions regarding it. My Lords, I must remind you of the circumstances which rendered the appointment of this Committee in 1877 desirable. I would say at the outset that I hope to prove that the proceedings which took place at the recent election at Holyrood were quite contrary in the spirit and in the letter to the report of the Committee of your Lordships' House. Before I proceed to prove the statement that I have made, I must recall to your minds the facts which took place before the appointment of that Committee relative to the Earldom of Mar; and I would say, in the first place, that I have been unable to ascertain that any Report has been forwarded to your Lordships' House from the Lord Clerk Register as to the proceedings at the election last spring at Holyrood.

Now, my Lords, the origin of the Earldom of Mar is, as your Lordships are aware, enveloped in a great deal of obscurity. I am not going back to the dark ages, which some historians say the Earldom of Mar sprang from; I am only going into facts which occurred in the present generation, and I hope that I shall, in dealing with those facts, not make any statement which may lead to any controversy upon the subject. The late Earl of Mar, who died in 1866, held the title of Earl of Kellie as well as that of Earl of Mar. On his decease, Mr. Goodeve Erskine succeeded through the female line as Earl of Mar, and was recognised as

such, and Colonel Erskine, his cousin, succeeded to the title of Earl of Kellie in the male line. The two titles, which were both held by the Earl who died in 1866, were thus divided, and the noble Lord who succeeded through the female line to the Earldom of Mar voted over and over again as representing the Mar Peerage at Holyrood.

Now, I must here call your Lordships' attention to a most important Resolution which was passed at the instance of the noble Duke opposite in this House in the year 1866. The father or grandfather of my noble friend behind me had, in the year 1822, carried the Resolution—"That no person, upon the decease of any Peer or Peeress of Scotland, other than the son, grandson, or other lineal descendant, or the brother of such Peer, or the son, grandson, or other lineal descendant of such Peeress, shall be admitted to vote at the election of the sixteen Peers to be chosen to sit and vote in the House of Lords of the United Kingdom of Great Britain and Ireland as representatives of the Peerage of Scotland, or at the election of any one or more of such Peers to supply any vacancy or vacancies by death or otherwise, until, on claim made on behalf of such person, his right of voting at such election or elections shall have been admitted by the House of Lords." But in the year 1862 the noble Duke opposite moved that the Resolution of the House of the 13th of May 1822 relative to the election of Scotch Representative Peers be rescinded. Therefore, my Lords, there is absolutely at the present moment no Resolution of your Lordships' House compelling a Peer of Scotland to come before your Lordships' House to claim his right to vote at the election of Representative Peers at Holyrood.

As I have said, Lord Mar voted repeatedly at Holyrood, and there was, I believe, on one occasion, if not on two, a protest on behalf of the father of the noble Lord opposite against his recording his vote. On one of these occasions a very curious thing occurred. In the General Election of 1868 there was a double return of Representative Peers for Scotland; the noble Lord's father and Lord Rollo were elected, both receiving sixteen votes. There was a double return, and neither of them could take their seats in this House, because if they had taken their seats there would have been seventeen Peers instead of sixteen. And in the year 1869 the late Lord Kellie presented a petition to this House to annul the vote which was given by Lord Mar, but instead of proceeding with that petition he withdrew it. I have here a copy of the Resolution of this House, and of Lord Kellie's petition, and in that petition Lord Mar is given the whole of his titles, and it recognises, as I say, officially his title to the Earldom.

Now, my Lords, after the late Lord Kellie's decease the

present noble Lord presented a petition claiming the title of Mar. The present Lord Mar opposed that claim, and it was brought before your Lordships' House, and after a very considerable time—a time which, I regret to say, is often wasted for the benefit of those whom I shall not name—the Committee of Privileges decided, on the 25th of February 1875, that his Lordship had made out his claim to an Earldom of Mar dated in 1565. My Lords, the following day there was an order sent down to the Lord Clerk Register, which had a very important bearing on this case. On the 26th—I think the day after the decision was given—the Lord Clerk Register was directed “that at the future meetings of the Peers of Scotland assembled under any Royal proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of the Earl of Mar according to its place in the Roll of Peers in Scotland called at such election” (“*according to its place*,” I beg you to note), “and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings in such election.” That was the Resolution of your Lordships' House.

What occurred after that Resolution had been carried? At the next election of Representative Peers for Scotland, there was, if I may so style it, a great row. Two Earls of Mar appeared, and so unseemly or so indecorous were the proceedings, that they ended in a great deal of, I may say, heated conversation. But, my Lords, after a few months had elapsed, the noble Duke opposite brought forward a Resolution in this House. The Resolution which he moved on the 9th of July 1877 was as follows:—“That this House doth order that at all future meetings of the Peers of Scotland assembled under any Royal proclamation for the election of a Peer or Peers to represent the Peers of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating in his name, do call the title of Mar in the Roll of Peers of Scotland called at such elections, in the place and precedence to which it has been declared by the Resolution and judgment of this House on 26th February 1875 to be entitled.”

My Lords, the moment the noble Duke did that, I moved the previous question, and a Committee of your Lordships' House was appointed to consider the matter. Now, I wish to remind your Lordships on what grounds that Committee was appointed, and on what grounds I moved the previous question. I submitted to your Lordships that it was entirely contrary to the Act of Union that any Peer should be called in his place in the Union Roll of Scotland in which the peerage stands at a certain date, while the

peerage which he holds is of a later date, at which there is no such peerage standing in the Decreet of Ranking which was affirmed by the Union Roll. Now, my Lords, I do not know whether it is the opinion of the majority of your Lordships' House, but I think it was the opinion of the majority of the Committee who sat upon the question, and I can safely say it is the almost unanimous opinion, or at least the opinion of the majority of Scotchmen, that no peerage which does not stand in its proper place upon the Union Roll of Scotland should be called as of a later date, and you cannot have a tinkering and tampering with the peerage upon the Roll of Scotland.

What did the Committee report? They made a most able Report, which I consider is a very important one indeed, affecting the privileges of your Lordships. Shortly, the Report is this: The Committee declared that the ancient Earldom of Mar remains on the Union Roll. I will not go through all the clauses, but I may say that that is on the face of the Report. They also maintained that Lord Kellie had not got that old peerage dated previously to 1457, but that he had got a peerage given to him by the Committee for Privileges dated 1565, which was not upon the Roll. In the last clause of the Report they did not recommend any Order to be made upon the subject; they left the Statute, the 10th and 11th of Victoria, chapter 52, to provide for the event of any future claim to the old Earldom.

Now, my Lords, after giving that brief *résumé* of the history of the two peerages, what occurred at the last election for Scotland? The Roll of the Peers of Scotland was called over, and the moment the peerage of Mar was called, the noble Lord opposite answered to the title as upon the Roll. His vote was protested against by two noble Lords who are here present this evening personally, and by proxy by about nine or ten Peers of Scotland, I believe; but that vote, so far as I can learn, was received and counted. Now, the question I have to ask is this, Did the Lord Clerk Register carry out the terms of the Statute of the 10th and 11th of Victoria, chapter 52? They are most distinct; I will not trouble your Lordships by reading them at length, but the third section of the Statute says, "That if at such meeting any person shall vote or claim to appear or to vote in respect of any title of peerage on the Roll called over at such meeting, and a protest against such vote or claim shall be made by any two or more Peers present whose votes shall be received and counted, the said Lord Clerk Register or Clerks of Session shall forthwith transmit to the Clerk of the Parliament a certified copy of the whole proceedings at such meeting." My Lords, I want to know whether that certified copy has ever been received. I want to know whether any notice has ever been

taken of the protests that were made against the vote of the noble Earl in respect of the Earldom of Mar as it stands upon the Union Roll; and I want to know what your Lordships intend to do upon the matter, because the Statute goes on to say that the House of Lords may "order the person whose vote or claim has been so protested against to establish the same before the said House."

Now, I say that upon this question we are in a very painful and peculiar dilemma. In the first place, the Committee for Privileges of your Lordships' House has decided that the noble Earl has got a peerage dated in 1565; but he has tendered his vote, and his vote is recorded for a peerage dated before 1457. The Lord Clerk Register is in this predicament: he has either accepted a vote from a peer holding a peerage which is not upon the Union Roll, or he has allowed a peer to vote for a peerage under the protest of two peers present, without transmitting a report of the proceedings to this House, and in defiance of the Report of the Committee for Privileges affirming that the holder of the peerage has not made out his title to that more ancient Earldom. That is a very awkward predicament that the Lord Clerk Register is in, and it is a very painful one for the peers assembled, whether a vote should be received for the ancient Earldom, and whether a protest should be acted upon or not.

I maintain that the Lord Clerk Register and the authorities guiding him have done more even than this. I think I can prove very clearly to your Lordships that the vote which was received and tendered by the noble Earl opposite was upon a peerage which is under attain. I must go back for a few moments to prove this, although the position is a very simple one. Mr. John Francis Erskine in the year 1824 appealed to the Crown to be restored to the titles and honours of his grandfather, who was attainted in the year 1715. That petition was referred to one of the most distinguished men of the present generation, Sir John Copley, afterwards Lord Lyndhurst, and the other law officers of the Crown. What did the law officers of the Crown, headed by Lord Lyndhurst, say in their report? I must remind your Lordships that Mr. Erskine was the grandson of the famous Lord Mar, who was attainted in 1715. Lady Frances Erskine was the only child of Lord Mar's who had issue, and she married her cousin, who afterwards became the heir-male of the family. But this is the most important point, I think, of the whole of this matter. When it was referred to Lord Lyndhurst to decide whether Mr. Erskine had proved his right to be Earl of Mar, he distinctly reported in favour of Mr. Erskine, ignoring Mr. Erskine's father and the male heirship; he only mentions him as the legal consort of Lady Frances Erskine. The law officers reported that the grandson of

the attainted Earl had made out his title and proved his pedigree solely through his mother. That being so, he was restored. Now the Earl of Mar was placed on the Union Roll at a date previous to the Earl of Rothes, which is 1457. There is no reason to fix the dates, but the Earl of Mar was placed on the Roll distinctly previous to the Earl of Rothes. Any Earldom of Mar except the one restored through the female succession distinctly could not have been excluded from the attain. The peer who holds the title given to him by the Committee for Privileges dating from 1565 is still under the ban of attain; it has never been removed. Still, even under this attain, he is allowed to vote as Earl of Mar upon the Roll, and holds a peerage under the Resolution of the Committee for Privileges, which was not restored by the Crown under the report of the law officers made in 1824.

What I want to know is this—Can the Lord Clerk Register call that new Earldom of Mar which was created in 1565 in any place upon the Roll at all, when the Resolution of the Committee of your Lordships' House says that the order of precedence must never be altered? We distinctly proved before that Committee that no precedent could be found for altering the date of a peerage to a later date;—you can put a peerage up, but there is no precedent for bringing a peerage down. And I want to know this—Ought not the noble Lord opposite to be prevented from voting upon a peerage which the Committee for Privileges have decided against? The Committee for Privileges distinctly said he had made out his claim to a peerage dated in 1565. I ask, Ought not the noble Lord to be prevented in some way from tendering his vote for a peerage which is not on the Union Roll, and which is still under attain, if it exists at all?

My Lords, I bring this subject forward without any intention at all of opening up sores which I hoped would long ere this have been healed. I thought that after the report of your Lordships' Committee no vote would have been taken from the noble Lord opposite upon an Earldom of Mar of an anterior date to the one which he was decided to hold. But a general election I believe may take place soon, and what will be the result then? You will have a commotion, a row; you will have certainly nine or ten Peers of Scotland protesting most strongly against a vote being received. I, for one, think this is a question which affects every Peer of Scotland in a most important degree, and I shall certainly continue my protest against any vote being received upon a peerage as being upon the Union Roll which does not exist there.

LORD CHANCELLOR.—My Lords, the noble Lord who has just spoken communicated to me the questions which he proposed to me to-day, and I shall answer them to the best of my ability; but

I have no intention whatever of following the noble Lord over the range of the discussion which he has raised with regard to the Mar Peerage. I cannot myself imagine what possible purpose would be served by pursuing a discussion of that kind in this House after the decision at which the House has arrived.

The two questions which the noble Lord put to me I will state to your Lordships, in order that the answers may be made intelligible.

The first of the questions was, as I understood it, Was the Lord Clerk Register justified, at the recent election at Edinburgh, when the Mar Peerage was called in the course of calling over the Roll, in receiving an answer from the noble Lord (the Earl of Mar and Kellie)? The view of the noble Lord who has just spoken upon that subject I understand to be this: that the peerage which is called on the Roll the Mar Peerage is not the peerage which, according to the view of the noble Lord, has been adjudged by this House to the Earl of Mar and Kellie, and therefore the Earl of Mar and Kellie should not have been allowed to answer when it was called. That, my Lords, depends upon the meaning of two Resolutions of your Lordships' House; I have no right to interpret them; but I will state them for your Lordships' consideration, and I will state also what I understand them to mean.

In 1875 the Committee of Privileges made a Report to the House, which was adopted by the House, upon the subject of the Mar Peerage, and this was the Report:—"That the petitioner, Walter Henry Earl of Kellie, in the peerage of Scotland, hath made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland created in 1565." "Ordered that at the future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a peer to represent the Peerage of Scotland in Parliament, the Lord Clerk Register do call the title of the Earl of Mar according to its place in the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings in such election." The Earl of Mar there spoken of is, of course, the Earl of Mar and Kellie.

Now, the Roll of Peers in Scotland is a public document which is perfectly well known; and in that Roll of Peers there is one entry, and only one entry, of the Earldom of Mar. It may be in its wrong place, or it may be in its right place; I have nothing to say as to that. It is there, and it is only in one place, and to that place this Resolution must necessarily have referred, for there was nothing else that it could have referred to. Therefore the Order of your Lordships' House to the Lord Clerk Register is this: that he is to call the title of the Earl of Mar according to its place in the

Roll of the Peers of Scotland. He has no authority to put it in a different place; he must call it in the place where he finds it; it is only found in one place; and when he calls it, and it is answered, he is ordered to receive and count the vote of the person who has been adjudged to be Earl of Mar and Kellie in answer to that call. I cannot myself see that any question can really arise as to the duty of the Lord Clerk Register. The Order of your Lordships' House speaks for itself; the Lord Clerk Register has nothing to do but to obey it; he is to call the title and receive the vote of the proper person when he calls it. That is the first question.

The second question which I understand the noble Lord to wish to put to me is this—Protests were entered, as I understand, at the recent election, against the Earl of Mar and Kellie being allowed to answer to the call of this peerage; and the noble Lord asks me secondly, Ought not the Lord Clerk Register to have returned these protests, or the whole of the proceedings, to the House of Lords, in pursuance of the Statute of the 10th and 11th of the Queen, chapter 52? That, again, depends upon the words of the Statute, which seem to me to be reasonably plain. The Statute says that if at a meeting for the election of Representative Peers “any person shall vote, or claim to appear or to vote in respect of any title of peerage on the Roll called over at such meeting, and a protest against such vote or claim shall be made by any two or more peers present, whose votes shall be received and counted, the said Lord Clerk Register or Clerks of Session shall forthwith transmit to the Clerk of the Parliaments a certified copy of the whole proceedings at such meeting; and the House of Lords, whether there shall be any case of contested election or not, may, in such manner, and with such notice to such parties, including the persons so voting or claiming to appear or to vote in respect of such title of peerage, and the persons protesting as the said House shall think fit, inquire into the matter raised by such protest; and, if they shall see cause, order the persons whose vote or claim has been so protested against to establish the same before the said House;” and if he shall not appear, or shall fail to establish the claim, then the House may order that he is to be put to silence for the future.

That applies, of course, to a case altogether different from a case like the present. The meaning cannot be that the Lord Clerk Register is to transmit the protests which were made on the occasion of the recent election to this House, in order that the Earl of Mar and Kellie may be called upon to establish his title here, because he has done that already. The House says he has established his title; and the meaning of the Statute cannot be that the Lord Clerk Register, as regards a person who has established

his title, is to go on transmitting protests against that title to this House, in order that he may be called upon to establish his title a second time. It obviously means that if there is a protest entered against any person who has not established his title, that protest is to be sent to the House of Lords, in order that the House may call upon him to establish his title in due course.

Those are the answers which I should respectfully offer to the questions put to me, and I do not desire to take any further part in the discussion which the noble Lord has raised.

LORD BLANTYRE.—My Lords, I cannot help thinking that the decision of the House in the Mar Peerage case was a very unhappy one, and one which is very much to be regretted. I take the facts from Douglas's Peerage of Scotland, both because Douglas has always been esteemed a good authority upon peerage matters in Scotland, and also because his work, having been published in 1754, is impartial as regards the recent proceedings. I find there that upon the death of Alexander Earl of Mar, in 1435, Sir Robert Erskine claimed, through his wife, the Earldom of Mar, and assumed the title twenty-two years afterwards. In the year 1457 his successor, Thomas, the first Lord Erskine, and the second Earl of Mar, was dispossessed of the Earldom of Mar. I now pass over several years, and I find that John the fifth Lord Erskine, and properly the sixth Earl of Mar, renewed his claim to the Earldom of Mar, and obtained permission to have the cause reheard, and his right being clearly and distinctly proved, he was restored *per modum justitiæ* to the Earldom of Mar and the Lordship of Garioch. He had a charter to John Lord Erskine, his heirs and assigns, of the Earldom of Mar, dated the 23d of June 1565, and he took his seat in Parliament accordingly as Earl of Mar; and he and his successors have always protested that they ought to be called first on the Roll of Peers, as possessing the most ancient Earldom in the kingdom.

My Lords, the whole case turns upon whether Queen Mary, in the year 1565, restored the old Earldom of Mar, or whether she made a new creation. Now, it is repugnant to the narrative I have given your Lordships, and which you will find in Douglas, and it is also repugnant to common sense, to suppose that Queen Mary, in place of giving to the Erskine family that which they possessed for twenty years, from 1435 to 1457, and which they claimed for more than 100 years after that, that is to say, when the new trial was granted to them, made a new creation, and gave them a new Earldom of Mar.

Upon these grounds, my Lords, I think the decision of the House was an unhappy one, and that the Earldom is now held by the wrong person.

EARL OF REDESDALE.—My Lords, it appears to me an extraordinary thing that any Peer should rise to contest the decision of this House upon a point upon which no other body could decide but the House. By the Act of Union with Scotland the Peers of Scotland are placed precisely in the same position in all respects as the Peers of England and other Peers, and there is certainly no privilege that the Peers of this country hold more dear to them or more important than that this House is to be the sole judge as to whether they are entitled to their honours or not.

Now, my Lords, with regard to the question of this peerage, it was gone into in the fullest possible manner, and none but those who have gone into the whole case, and have investigated all the evidence that was brought forward, are really competent to pronounce an opinion upon it. To pick up small matters from other authorities than those which were brought before the House on that occasion is not a fair way of discussing the question, and it is not one which, I think, ought to have any weight with your Lordships.

Now, my Lords, the question with regard to the position of Peers of Scotland appears to depend entirely upon the Union Roll which was taken from the Decreet of Ranking drawn up in the reign of James VI. of Scotland in the year 1606. Now, my Lords, the Decreet of Ranking is by no means a perfect matter. On the contrary, it has been open to dispute from the time it was first made down to the present day, and very great differences have been pointed out. At the time of the Union what happened on this matter? On the production of the Roll the Earl of Sutherland gave notice to the House that there was now depending between him and the Earl of Crawford some dispute about their precedence. The question was referred to a Committee of Privileges, and on Thursday, the 17th of May 1707, the list of the Peers was laid upon the table, and it was ordered to be entered upon the Roll of Peers, with this salvo, that "whereas there are several protests entered upon the Records of the Parliament of that part of Great Britain called Scotland, in relation to the precedence of Peers, the said protests shall be and are of the same force with relation to the table of precedence as if they were entered upon the Roll of Peers and in the Journals of the House of Lords." Thereby the House recognised its authority over these disputes with regard to precedence, and that Order was acquiesced in from the time that it was made. Now, the precedence has been at times to a degree interfered with, that is to say, proof has been given of a different precedence from that which appeared upon the Union Roll based upon the Decreet of Ranking, but the House has never altered the precedence in any of those

cases, notwithstanding that by the clearest proof the date upon the Union Roll was shown to be wrong. It is quite evident that it is quite as easy that a date of higher precedency might have been granted as of a lower one. Of course, it would not invalidate the peerage although it was called as of a different date from that to which it was entitled. There is a noble Lord now sitting below a noble Marquess whose title was proved in this House to be of some 300 years' precedency to that which it had given to it by the Decreet of Ranking. Still his name is called on the Union Roll in the place in which it is put in the Decreet of Ranking, and not in the place in which the Resolution of the House giving him a peerage of an earlier date would have put him.

Now, my Lords, very soon after that occurrence, in 1710, the Duke of Ormond claimed the peerage of Dingwall, which was not upon the Roll. He claimed to be placed upon the Roll immediately after the Lord Madertie. The matter was referred to a Committee of Privileges, and the Committee of Privileges reported that he ought to be placed next above Lord Cranstoun. The effect of that was to give him a precedency four places higher than he had claimed. Therefore, the House obviously has had the power of determining where a peer shall be placed upon the Union Roll, and had acted accordingly.

My Lords, in reference to the question of what is called the ancient Earldom of Mar, the precedency which was given by the Decreet of Ranking was not the precedency of the ancient Earldom of Mar, and nobody who has ever claimed to have anything to do with the ancient Earldom of Mar could admit the ranking of the Decreet of Ranking to be the proper one for that Earldom. From the decease of the last heir-male of the ancient Earls of Mar in 1377 to the present day there has never been one instance of any single person representing either in the Parliament of Scotland, or in the Parliament of the United Kingdom, the ancient peerage of the old Earldom of Mar. The date given by the Decreet of Ranking was, as the noble Marquess has himself said, 1457, or about that time. The Earl of Mar is placed by the Decreet of Ranking between Lord Rothes, created in 1458, and Lord Erroll, created in 1452, and the date always accorded to him has been 1457. In the Decreet of Ranking no dates were given, the peerages were merely put in their several places without giving any specific date with regard to them. But it is most important to note that the place in which the Earl of Mar was put was that of 1457.

Now, my Lords, the decision of the Decreet of Ranking turned upon the documents which were laid before the Commissioners for making that Decreet by the Peers themselves. What were the

documents that were laid by the Earl of Mar on that occasion before the Commissioners for framing the Decreet of Ranking? Two important documents which he laid before them were a surrender and regrant of the territorial comitatus of Mar in 1404 to Isabella, who was the niece of the last Earl of Mar, and who was no doubt in direct lineal descent his representative, and also a retour which showed that the then Earl of Mar was her lineal representative.

Now, the Commissioners for the Decreet of Ranking refused to admit the former of these documents as having any Earldom attached to it, and they did not give the Earl of Mar the precedence of 1404—they gave him the precedence of 1457; and thereby evidently declared that that surrender and regrant did not contain an earldom in it, that it was a surrender and a regrant of the territorial comitatus only—they refused to put him higher than 1457. I would remark this particularly; there was a very elaborate protest entered by a noble Earl at the late election. I may mention him, as he is not present—I mean Lord Crawford. He stated roundly that the precedence which was allowed by the Decreet of Ranking was a precedence of 1404 upon that document. Now, my Lords, the precedence given was not of 1404, but of 1457. I will also remark that Lord Mar did not bring before the Commissioners for the Decreet of Ranking the charter by which the territorial comitatus had been restored to his ancestor by Queen Mary. He gave in these other documents hoping that that surrender and regrant to Isabella would be the ground upon which his right to the peerage would be rested.

Now, my Lords, the question is—Why was the precedence of 1457 given to the Earl of Mar by the Commissioners? I hold it to be a most distinct proof that they were determined that by no act of theirs would they recognise the existence of the ancient Earldom of Mar. Nobody could pretend that that was the date of the ancient Earldom of Mar, that is to say, of the Earldom held by the last heir-male, who died in 1377. The reason why they took that date I believe to be that at that time there was an Earl of Mar sitting in the Scotch Parliament. James II. of Scotland had created one of his younger sons Earl of Mar, and therefore there was an Earl of Mar sitting in Parliament in 1457. If any one claims under the finding of the Decreet of Ranking, that is the Earldom of Mar to which he must make his title good, because that is the only one which is at all connected with the place upon the Union Roll.

The effect, therefore, of what has taken place is this—The Report of those who gave judgment in the late case was that the Earldom of Mar was a new creation in the time of Queen Mary.

That no other Earldom of Mar is in existence was proved, as I say, by the extinction of the ancient Earldom for 500 years, during which time no representative of it has ever appeared in any place in Parliament whatever. The entry, therefore, of the Earldom of Mar in the Decreet of Ranking as of 1457 was an erroneous entry. Everybody, whichever way he votes, will hold that that was not the proper place in which the Earldom of Mar should be put. There is no doubt that the Earl of Mar in James VI.'s time desired to make good his claim to the ancient Earldom, and he put in these documents in order to maintain that claim, and kept back other documents which might perhaps have induced the Commissioners, if they had had them before them, to give him the other date of creation, namely, the same year in which the comitatus had been restored to him.

Now, my Lords, if every Peer is to determine whether a judgment of this House is right or not, and to act upon his own idea as to whether a judgment is right or not with regard to a matter of this kind, confusion of the most unfortunate character must necessarily arise. The decision of this House is that the person claiming to be Earl of Mar is certainly in the wrong place on the Union Roll, because they have found the time when they held that that Earldom was created; but, if the Peers individually are allowed to come forward and say, We do not approve the decision of the House in this matter, and we shall go on disputing and protesting, of course there will be nothing but confusion henceforth in the elections of Peers for Scotland. I think, my Lords, that there was great reason for the motion that was made by the noble Duke, which was alluded to, of having an alteration in the date of that peerage upon the Roll. At the same time there is no doubt that if we once begin to make alterations in the Union Roll, there are so many errors in it that the claims that would be made for an alteration of precedence would be such as would give the greatest possible trouble and inconvenience to the House: therefore it may be desirable to allow a peerage to be called in the wrong place rather than to take the trouble of altering that place.

My Lords, I would just mention what occurred, I believe, with regard to a peerage which was restored some little time ago to my noble friend Lord Balfour of Burleigh. His is a peerage which I believe was proved to the House to have been created in 1607, and the finding of the House with regard to the placing of Lord Dingwall was that he was created in 1609—and they also found that Lord Cranstoun had been created in 1609, a little later. They therefore put him a little above Lord Cranstoun, and by that fact put him above my noble friend Lord Balfour of Burleigh, who

stood between Lord Cranstoun and Lord Madertie. Therefore your Lordships will see that very great confusion would arise if we were once to begin to move the positions of peers upon the Union Roll in consequence of the full inquiries which are carried out by this House upon the subject, very different inquiries from that which was instituted at the time when the Decreet of Ranking was framed. My Lords, the Decreet of Ranking was completed with regard to the whole of the Scotch Peerage in a very short space of time—about a year I think—and it was framed entirely upon whatever documents the Peers themselves might think fit to bring forward.

My Lords, having taken part in the judgment upon this Mar Peerage case, and having inquired into the matter very much since, and found out those points which I have just mentioned with regard to the fixing of places by the Decreet of Ranking, I have thought it my duty to state to your Lordships what upon full consideration I conceived was the reason for placing the Earldom of Mar where it was placed in the Decreet of Ranking. If the Commissioners had taken any vacant time where there was no Earl of Mar in Parliament, it might have been said that it was the old Earldom, because no other earldom existed at the time; but they did not do that. They purposely, as it appears to me, took a time when there was an Earl of Mar in Parliament, and they fixed that as the date of the Earldom; and if anybody has a claim to the Earldom as placed in the Decreet of Ranking, and now on the Union Roll, he must claim the Earldom which was granted by King James II. of Scotland to one of his younger sons, and that is an Earldom which became extinct in 1475.

EARL OF GALLOWAY.—My Lords, I think if anything would induce your Lordships to rescind the Resolution you came to in 1875, it is the speech which you have just heard from my noble friend at the table (the Earl of Redesdale). I certainly, though a Scotch Peer, was not prepared to hear him or any other Peer in this House speaking in that contemptuous and sneering way of the Decreet of Ranking. One would think that my noble friend must have been living in the year 1606, for he seems to know exactly what was done at that time. He informs us that the Commissioners only took a year to frame the Decreet of Ranking, and he informs us also that the Decreet was only fixed upon the different documents which could be produced by the noble peers themselves. Well, my Lords, I leave you to judge whether it is anything very remarkable if the Decreet of Ranking was fixed in such a way as that.

But I think I can tell your Lordships something about the Decreet of Ranking. The peers of Scotland were, in 1606, for

the first time, formally ranked by order of the King under the Great Seal: by the terms of this Decreet they were ranked "according to the antiquity of the documents they then produced." The noble Lord at the table is quite right there. The rank thus accorded was final, with the provision that leave was given to obtain higher rank by the subsequent production of "more ancient documents." I may just add this, as my noble friend has gone into the whole question, that Lord Mar (as was pointed out by the law officers advising on behalf of the "Crown" in the year 1874) produced in the year 1606 documents which are still extant proving his Lordship's heirship, through maternal ancestry, to Isabel Countess of Mar in her own right, and he was ranked with precedence of more than a century before Queen Mary's time. Well, my Lords, if that is not a complete answer to my noble friend I do not know what is.

However, my Lords, I had not intended upon this occasion to go particularly into the question of the Earldom of Mar. What I suggested to myself to do was to ask your Lordships to listen to me for a moment or two while I ventured to point out to your Lordships that this House really was not competent to decide this question. (Oh! Oh!) Yes, my Lords, I see that my noble friend at the table is greatly surprised. He condemns the Decreet of Ranking, he says that the Decreet of Ranking is nothing, he says that this House has power to alter any title it chooses. Well, my Lords, I say, according to the terms of the Act of Union that is not the case. It was decided by the Treaty of Union in 1707, that a judgment of the Court of Session in the year 1626 was to be final and unalterable. Therefore, my Lords, I say that with regard to any question which was tried and decided by the Court of Session before the Act of Union, it is not competent for your Lordships' House to reverse that decision now.

But, my Lords, as was pointed out by my noble and learned friend on the woolsack, your Lordships' House has never given a judgment upon this question. What it has given is not a judgment, for it is not a judicial proceeding, it is merely an opinion. My noble friend at the table shakes his head at that. I will state to him what was said by the noble and learned Lord on the woolsack, and what was said also by the late Lord Chelmsford in the year 1869 in this House. What was said by those two noble and learned Lords was this: "The opinion of a Committee of Privileges is not a judgment." Those are the noble and learned Lords' own words. It was pointed out by my noble and learned friend on the woolsack that it was merely a "Report," that is the term which he used—it is a Report of the Committee of Privileges to your Lordships' House. The Report was adopted, but still I say it was not

a judicial proceeding—it was not brought before the House of Lords as a judicial court, it was only a Committee of Privileges. I may be in error, but, as I understand it, properly speaking the Resolution should have been submitted to the Sovereign of these realms for Her Gracious Majesty's approval. In the case of honours, I believe that to be the proper course. But in this case I am afraid there was very great and unnecessary hurry, and for some reason which has never yet been explained, the Resolution was immediately sent off to Edinburgh without an opportunity being afforded for its being shown to the Sovereign of these realms first. I believe, my Lords, that that was a most irregular proceeding.

My Lords, I say that this was not a judgment but merely a report, and that it was not by the terms of the Act of Union competent to your Lordships' House to reverse a decision which had already been adjudged previous to the Union of the two countries. My Lords, especially as the noble Lord has gone on so far into the details of this matter—I should like him to be kind enough to listen to what the judgment of the Court of Session in 1626 was. The Court of Session declared formally "that the ancient Earldom of Mar was still in existence, descendible through female succession to heirs-general; that the heirs had been temporarily deprived through illegal seizure and usurpation in 1457, but that these wrongs were redressed in 1565 by Queen Mary, whose charter restored to the heirs of the said Countess Isabel and their heirs-general hereditarily the ancient Earldom, and which charter included the dignities,"—because, my Lords, patents of honours independently of lands were unknown till many years afterwards. That I am sure my noble friend will admit.

EARL OF REDESDALE.—Not even that.

EARL OF GALLOWAY.—I can further inform your Lordships that the ancient Earldom of Mar was, in accordance with the Decreet of Ranking, which is held in such contempt by my noble friend, placed in 1707 on the Union Roll. That Roll was formally accepted as authentic by the British Parliament in the year 1707, and the Earldom of Mar stood upon it with its old precedence. It was attainted by Act of Parliament in 1715, and in 1824 it was restored by an Act of Parliament to the "grandson and lineal representative" of the attainted Peer (as the Act states), which positions he (the restored Earl of Mar) held alone through his mother, Lady Frances, and the report of the law officers of the Crown, preliminary to the restoration, declared moreover that he was about to be restored as "her heir," not as the heir of his father, who was the representative of the male line.

Now, my Lords, I wish also to call your Lordships' attention

to this, that in the Resolution of 1875 your Lordships' House carefully abstained from the remotest allusion to the ancient Earldom of Mar on the Roll, regarding which there was no claim before your Lordships' House. Of course it could not have been legally included,—because, as I have said, the case had already been decided by the Court of Session before the Act of Union.

My Lords, of course it might be thought by those who were ignorant of the law affecting Scottish peerages, that it is necessary for Lord Mar, who succeeded his uncle, and who at present is entitled to the dignity, to claim his title before your Lordships' House; but that is not the case. A Scotch Peer is not required to do that. I believe it is perfectly true that if he was anxious to become a Representative Peer, and if his right was challenged, in that case he might be called upon to prove his right when the title was challenged. But the present Lord Mar was served heir to his uncle—and that is all that a Scotch Peer is required to do in order to succeed to a title of dignity enjoyed by his predecessors. Therefore I say, my Lords, that any other course would not only be unusual and unnecessary, it would be contrary to Scotch usage—Scotch usage is treated with contempt by my noble friend at the table I have no doubt: still we had that law in Scotland before the Act of Union.

My Lords, I say that by the law of the land, on the death of a Scotch Peer or Peeress his or her title passes *de jure sanguinis* to the next heir, and it rests with an opponent to upset the pedigree, or to prove a different line of succession to the peerage if possible. Well, my Lords, all I can say is this: I have attended several meetings for the election of Peers at Holyrood in the last few years, and I have never heard any formal protest against the claim of the Earl of Mar, who succeeded his uncle in 1866. On the contrary, the protests have all been made against my noble friend near me. My noble friend says that he has protested at every election. I confess I should have been inclined to make him an exception, but I was not aware that even he had protested. My noble friend near me has ventured to get up and has answered to a title which your Lordships have named, and that he has not got. (No, no. Hear, hear.) It is a fact. Does my noble friend at the table venture to say that the House found that my noble friend near me is entitled to a peerage which, upon the Union Roll, is put above the Earl of Rothes in 1457? Not one of the noble Lords says so.

EARL OF REDESDALE.—I merely say that he has not proved his right, and no one can prove his right to the title of Mar which was in existence in 1457, because it is not in existence now.

EARL OF GALLOWAY.—Of course if my noble friend says it is not in existence, I suppose there is no disputing it, because he has

already informed us that he was living in 1606, when the Decreet of Ranking was framed, and he has informed us how it was done,—it was done by documents. My noble friend does not judge by documents himself. He informs us exactly what was done at the time, and exactly what we ought to do now. I just wish to remind your Lordships what was said by my noble friend Lord Mansfield, who unfortunately is not well enough to be here on this occasion, how he showed you that John Francis Erskine, Earl of Mar, was served heir to the late Earl, and that he still retains his Earldom of Mar, and every Scottish Peer in this House is in exactly the same position as that Earl of Mar. My noble friend went on to say that every one in Scotland is well aware that “you are merely returned heir to your peerage, and you take it; you do not come to this House for it.” It is in that position that the Earl of Mar stands at this present moment. The House of Lords by their Resolution on February 26th, 1875, came to the conclusion that Lord Kellie had proved his claim to a peerage of 1565, but they never said one word about the ancient peerage on the Roll, therefore that peerage remains intact at the present moment.

And, my Lords, I must not forget to observe and to remind my noble friend at the table that this was specially confirmed by an Act passed in the year 1587. The old title was then restored. Of course I have no doubt that my noble friend will construe any word. The terms of this restoration were given in Latin. I do not pretend to be a very good Latin scholar, but I do know this, that the word *restituere* means to restore, and does not mean to create. The word *restituere* was the word used by Queen Mary when she restored this ancient title.

EARL OF REDESDALE.—It was the *comitatus*.

EARL OF GALLOWAY.—Very well, my noble friend is very anxious to hear about the *comitatus*. I will tell him that the *comitatus* always carried the dignity, but I do not think I need trouble your Lordships by going further into that. (Hear, hear.) Yes, but this is a very important matter. I am sure that all your Lordships must remember that in your childhood you have in your copy-books written in large hand over and over again, “Be just before you are generous.” Now, my Lords, my noble friend near me certainly cannot complain of a want of generosity at your Lordships’ hands. I ask no generosity at your Lordships’ hands for the rightful heir, for him who has succeeded to the peerage, and who is the lineal descendant of the late Lord Mar. I say I do not ask any generosity for him, but, my Lords, I do implore you to give him justice.

LORD SELBORNE.—My Lords, I really hope that this discussion will be brought to a close. (Hear, hear.) It seems to me to pro-

ceed upon a forgetfulness of that which we all know, and that is, that even this House is obliged to pay respect to the law. Now, with regard to claims to Scotch peerages, the law, as I understand it, and it is Statute law, and in that respect it rests upon higher ground than the law which relates to English claims of peerage, is that claims to Scottish peerages are to be investigated in a certain manner, not by a debate in this House, but in the manner which we all know is usual; and the decisions so arrived at have the force of Statute law. I own, my Lords, that I think that if the noble Earl at the table had contented himself with saying that he would have done more wisely than by endeavouring to establish the soundness of the reasons upon which the decision upon the Mar Peerage case in the year 1875 proceeded. If those reasons are brought again into the region of discussion, it is but natural that opinions should differ upon them. But the truth is, we have no business at all to go into any such discussion. The House has decided, and that which it has decided is law. That decision is that a certain peerage of Mar was created by Queen Mary, and that it belongs to the noble Earl opposite. To that extent the whole House is bound.

And, for my own part, I take the same view of the construction of the Order referring to the duty of the Lord Clerk Register which is taken by my noble and learned friend on the woolsack, that is to say, that when the House said that the peerage was to be called as it stands upon the Union Roll, the Lord Clerk Register has done nothing wrong in taking the Union Roll as he found it, and, if there is only one Earl of Mar there, in treating that, for the present at all events, as the proper place for the peerage which the House has declared to belong to the noble Earl opposite.

I do not understand that the House has decided anything whatever affirmatively or negatively with regard to the ancient Earldom of Mar. What was said in the Committee of Privileges about it is a wholly different thing from a Resolution of this House. The Resolution of this House simply was in the affirmative, that the noble Earl opposite had established his right to the peerage of Earl of Mar, created by Queen Mary in a certain year. This House did not say that the old Earldom of Mar was extinct, and it did not say that it would refuse to entertain a claim if a claim should ever be brought forward by any person undertaking to prove that he was entitled to that old Earldom. That question, I say, has never been decided by the House. Last year or the year before, when a petition was presented by the noble Earl opposite upon this subject, and a Committee was appointed by this House to consider the question so raised, that Committee pointed out that if any person thought fit at any election of Representative

Peers for Scotland to claim an Earldom of Mar in addition to that created by Queen Mary, that is to say, to claim the older Earldom, and if that claim was objected to in a certain manner by two peers, the proceedings must then be reported to the House, and the House could, according to the particular procedure prescribed by the Statute which has been quoted, call upon the claimant whose vote was objected to to establish his claim, and then he would be entitled to produce any evidence in his power in support of that claim. It has not been at all determined how far that evidence would or would not be the same as the evidence which was produced on the former occasion, or how far it would or would not be open to a future Committee of Privileges to take different views from those which were taken in the year 1875.

My Lords, I cannot but observe, in conclusion, that I hope my noble friend at the table will take to heart the lesson of these proceedings. It was only this day last week that my noble friend himself asked your Lordships as a deliberative assembly to review various proceedings in the courts of law and elsewhere resulting in a legal judgment found upon an award. He asked for the appointment of a Committee to inquire into that award, and into all the proceedings and all the circumstances connected with it which had taken place ten years ago, I believe. My noble friend thought that that was a proper matter after these judicial determinations to be brought into debate in your Lordships' House, in which each person would, to use the expression he has just used, "pick up his information where and how he could." My Lords, if that is to be done, and if your Lordships are not bound to regard legal determinations of courts of law, you cannot possibly prevent the same rule being applied to the determinations of your Lordships' House, and it appears to me that it is at least as fit a subject for this House to inquire into whether a proper decision was arrived at in the year 1875 upon the Mar Peerage case, as to enter upon such an inquiry as the noble Earl at the table himself proposed a few days ago.

THE EARL OF STAIR.—My Lords, I think your Lordships will agree that this matter was introduced by my noble friend below me in a most temperate manner, and I quite agree with the observations that were made by my noble friend opposite. I have no wish to occupy your Lordships' time by continuing the discussion for more than a few minutes, but there is just one thing which fell from the noble Lord, the Chairman of Committees, on which I wish to say a word. I feel very anxious that the Roll of the Peers of Scotland should be accepted as it was fixed at the time of the Union. By this proceeding which we are just now discussing that order has been altered, and that will lead, I think, to a great

many disputes hereafter. I was present at the last election at Holyrood of Representative Peers for Scotland, and I was one of those who protested. I think that the protest which was signed by other noble Lords as well as by myself ought to have been taken some notice of. When the Earl of Mar's name was called out as it stood upon the Union Roll it was answered by my noble friend opposite. It seemed a very extraordinary thing to me that he should answer to it, seeing that he only holds a title, according to the Resolution of your Lordships' House, dating from the year 1565. I do think that under the circumstances the protest signed by myself and other noble Lords also should have been taken some notice of.

MARQUESS OF HUNTLY.—I do not wish to detain your Lordships. I only wish to repeat one of my questions which the noble and learned Lord on the woolsack did not answer: I refer to my question as to this peerage being under attain.

LORD CHANCELLOR.—If the noble Lord will be kind enough to give me notice of the question I will endeavour to answer it. I answered the two questions of which he gave me notice, and I really do not know what the third is.

## No. IV.

## LETTER FROM EARL OF CRAWFORD IN "MORNING POST,"

1st July 1880.

SIR,—Being unable to be in London on Thursday, the 1st July next, I would fain be permitted to draw the attention of Lord Mar's friends to two or three points connected with Lord Redesdale's intended motion in opposition to Lord Galloway's motion standing for that day.

It was resolved by the House, on the 14th inst., on Lord Galloway's motion, that it was incumbent upon the House to rescind the Order of the House to the Lord Clerk Register on the subject of the Mar Earldom, 26th February 1875.

Lord Galloway's motion for the 1st July is that this Resolution of the House be carried into effect.

It is very natural that Lord Redesdale should wish to maintain the Order 26th February 1875, on the grounds he lays down; but the reasons for its cancellation appear to me to predominate.

The Order is peccant on the following points:—1. It assumes that the place and precedence of the Earldom of Mar, standing on the Union Roll of the Peers of Scotland with a precedence admitted on all hands as (at latest) from 1457, is vacant through extinction of that Earldom; 2. It places Lord Kellie, as Earl of Mar created in 1565 (according to the Resolution of the House upon which the Order proceeds), in the place and precedence of the Earldom of 1457; 3. It precludes the heir-general, the Earl of Mar, who is in possession of the Earldom of 1457 by the law of Scotland, from his seat and vote at the elections at Holyrood; 4. It places Lord Kellie, as Earl of Mar created in 1565, over the heads of eight Earls created between 1457 and 1565, to the violation of their rights of precedence, four of whom have specially protested against it; and lastly, 5. The Order was issued in the same breath with the affirmation of the Resolution, and before the Resolution had been submitted to Her Majesty, the ultimate judge, thus taking her approval for granted, although it was in her option to refer the Report of the Resolution back for further consideration, or to act independently of the Report, as should to her appear just and right. The House was *functus officio* when it passed the Order, which was therefore *ultra vires*, premature, and informal.

The Order was framed and issued by the House (or by those who acted on its behalf) under the impression that the Resolution upon which it proceeded was double-edged; that the Resolution extinguished the original Earldom and annihilated the pretensions of the heir-general on the one hand, while it recognised and established the Earldom of 1565 as the only existing Earldom on the other. The ground of this impression was a belief that the speeches of those who advise Committees for Privileges towards coming to their Resolutions are to be imported into the Resolutions, and thus form part of the so-called "judgments." The speeches on the claim of the Earl of Kellie asserted that the original Earldom was extinct, and that no Earldom of Mar existed but that of 1565, thus leaving no opening for the right of the heir-general. Had these speeches been importable into the Resolution, then it might be contended that no injury had been done to the heir-general by placing Lord Kellie in the place of the ancient Earls; and such was doubtless the impression in 1875, the effect of the Order upon the precedency of the eight Earls not being thought of. But it was laid down distinctly and clearly by the late and the present Lord Chancellors in the debate upon the Duke of Buccleuch's Resolution in 1877, which preceded the appointment of the Select Committee, that the speeches in Committee are merely personal opinions which may not be imported into Resolutions, the Resolution of 1875 being confined to the simple recognition of the Earldom of 1565, and not susceptible of any reference to that of 1457; while the Report of the Select Committee, drawn up by Lord Cairns, and proceeding upon this basis, recognised the fact that the question whether the original Earldom of Mar was extinct or not was (in the eyes of the House) an open question. The law Lords, Lord Redesdale, the Duke of Buccleuch, and others, who had been under the strong impression thus shown to have been erroneous, all concurred in this wholly new view of the question, and acknowledged it with a frankness and a tone of consideration for the heir-general worthy of all recognition and acknowledgment. The Report of the Select Committee did not recommend that the Order should be rescinded; but it is evident that the maintenance of the Order is incompatible with the views and provisions of the Report in question, and with the *dicta* of the noble and learned Lords in the debate referred to on the Duke of Buccleuch's Resolution.

But the noble and learned Lords in question and the Select Committee further laid it down, and with perfect correctness, that the House of Lords has no power to deal legislatively with Scottish Peerages standing on the Union Roll, or with the elections at Holyrood, except in so far as such legislative power is delegated to them by the Legislature; and that this has been done to a

certain extent. It is clear, therefore, that as the Order of 26th February 1875 tampers with the precedence of Peers, not only as affecting the Earldom of Mar itself, but the rights of the eight Earls above spoken of, it is *ultra vires* on that score alone, and ought to be rescinded.

Lord Redesdale lays stress on the fact that the Order proceeded on a Resolution arrived at by the House after full investigation in 1875. No one can question the full and anxious investigation bestowed on the case by those who advised the Committee. But unfortunately they advised, and the Committee reported, in accordance with the private rules of the House handed down from last century, especially one affirmed in 1762 and 1771, to the effect that the presumption is in favour of heirs-male in cases where the original charters or patents of dignities have not been preserved; whereas, by the law of Scotland, the presumption is in favour of the heir-general under such circumstances. Lord Stair's words are clear on the general point—"Heirs-portioners are amongst heirs of line, for when more women or their issue succeed, failing males of that degree, it is by the course of law that they succeed, and because they succeed not *in solidum*, but in equal portions, they are called heirs-portioners; and, though they succeed equally, yet rights indivisible fall to the eldest alone, without anything in lieu thereof to the rest, as—1. The dignity of lord, earl, etc.; 2. The principal mansion, being tower, fortalice, etc.; 3. Superiorities," and so on. So, too, in the final judgment of the Court of Session in the claim to the barony of Oliphant in 1633, where there was no writ or charter to show erection of the dignity, the Lords held that "use was enough, conform to the laws of this realm, to transmit such titles in the heirs-female where the last defunct had no male children, and where there was no writ extant to exclude the female." And Charles I., in his warrant for a charter of confirmation of the dignity to the heir-general of Oliphant and her husband, 16th March 1640, describes it as "due and proper to the said Dame Anna, as lineally descended of her grandsire," and as "inherent in the right of blood flowing from the first Lord Oliphant." The learned and accomplished Lord Marchmont thus urged in Committee on the Cassillis claim of 1762, "Certainly our succession was always lineal and always female; and where there was an heir-male he was no heir at law, but an heir of provision." No such special provision was alleged in favour of Lord Kellie in regard to the ancient Earldom of Mar; on the contrary, his claim was confined to a totally different dignity. Lord Mar's right stands, therefore, irrefragable by the law of Scotland; and moreover by that law, if the Earldom of 1565 ever existed, it appertains to him, and not to Lord Kellie,

as, indeed, the Attorney-General and the Solicitor-General for Scotland pointed out to the Committee for Privileges in 1874, although their testimony was disregarded. Now, by the law as testified to by Lord Cairns and Lord Selborne in the debate on the Duke of Buccleuch's Resolution, and upon which the Report of the Select Committee proceeded, if the House possesses no legislative power apart from delegation, it has no power to frame private rules subversive of the law of Scotland, or to overrule final decisions of the Court of Session; and thus the Resolution of the 26th February 1875, proceeding as it does on two private rules of 1762 and 1771, and in disregard of and contradiction to the Oliphant judgment of 1633, and the Mar and Elphinstone judgment of 1626, is but an unstable basis for the Order built upon it, as vindicated by Lord Redesdale.

The words "resolved and adjudged" are a mere formula, not expressive of a judicial act in any absolute sense, but prefixed according to ancient usage to the opinions submitted to the Sovereign's better judgment, as the advice of the House on a peerage-claim referred to it by the Sovereign.

The risk of establishing "an objectionable and dangerous precedent," urged in Lord Redesdale's counter-motion, is not, I think, very serious. A precedent directly in point took place during last century. By a general Resolution, December 20, 1711, the House of Lords ruled that no Scottish Peer, created a British Peer, shall be permitted to sit and vote in the House, and the Dukes of Hamilton and Queensberry, who had been created Duke of Brandon and Dover, by Queen Anne, were thus debarred from their seats from 1711 till 1782, in which latter year the House rescinded its former Resolution on reference to it by the King of a petition from the then Duke of Hamilton, claiming his writ of summons as Duke of Brandon, the Duke of Queensberry and Dover being then dead, after surviving his exclusion sixty years. The House cannot be less sensible to the claims of justice now than it was a hundred years ago.

As the matter stands the House has assented to the Resolution that it is incumbent upon it to rescind the Order of 26th February 1875. It is now invited to carry out that Resolution.

Nothing is asked for but the cancellation of the Order. Nor is Lord Galloway called upon (as the Lord Chancellor suggested in his reply to Lord Huntly on the 21st ult.) to propose an Order in substitute for it. The *onus* of proposing such a substitute rests, I conceive (if at all), with those who placed the obnoxious Order in the position which it now occupies.

CRAWFORD AND BALCARRES.

FLORENCE, 27th June 1880.

## No. V.

## DEBATE IN THE HOUSE OF LORDS, 14TH JUNE 1880.

*(From Hansard's Parliamentary Debates.)*

THE EARL OF GALLOWAY, in rising to call attention to the Report of the Select Committee appointed "to consider the matter of the petition of the Earl of Mar and Kellie, presented on the 5th of June 1877" (the prayer in which petition was that the title of Earl of Mar should be brought down to the date of 1565 from its existing place on the Union Roll), "and the precedents applicable thereto;" and to move the following Resolutions, namely:—

"That the Select Committee thus appointed having reported to the House on the 27th June 1877 'that they had not been able to discover any precedents of Orders made by the House for altering the order of precedence of the Peers of Scotland on the Union Roll;' and further, 'that they were not disposed to recommend that any Order should be made on the petition of the Earl of Mar and Kellie;'

"That in order to give due effect to the recommendation contained in this Report, it is incumbent upon this House to rescind their Order of 26th February 1875, which ran as follows, viz.:—'That at the future meetings of the Peers of Scotland, assembled under any royal proclamation for the election of a peer or peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar according to its place on the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said earldom, and do permit him to take part in the proceedings of such election;'

"That in accordance with the Resolution of 25th July 1862, whereby Scotch Peers are not required to obtain from this House recognition of their titles before enjoying their rights and privileges, and voting at the election of Scotch Representative Peers, John Francis Erskine, being the nephew and undisputed next of kin of the late John Francis Miller, Earl of Mar (who died in 1866), and having observed the forms usually complied with by Scotch Peers on succession, is entitled in accordance with the protests made by many Peers at Holyrood to remain in enjoyment of the privileges he inherited as tenant, *de jure* and *de facto*, of the earldom of Mar standing on the Union Roll of Scotland, no other person laying claim to that

same earldom, and the said earldom having been in no way affected by the Resolution of this House on 26th February 1875, which conceded to the Earl of Kellie an earldom of Mar of the date of 1565,"

said, he was obliged to make an apology to their Lordships for bringing forward a Scotch subject; for ever since he had been in Parliament he had found that Scotch subjects were considered rather uninteresting in their character. He had, in fact, heard it said—"Why cannot these Scotch fellows manage their own business?" He must say, for his own part, that if this particular matter had been left to be decided in Scotland it would have been decided speedily, finally, and without ambiguity; and, further, it would have been decided to the satisfaction of the bulk of the Scotch people. He desired to state plainly, and as concisely as he could, the objects of these Resolutions. First of all, he wished that House to extricate itself from what he might term an embarrassing state of ambiguity, which he would explain by and by; secondly, he was anxious that the House should uphold Acts of Parliament which were passed in Scotland before the Union, or in the British Parliament since the Union. By an article in the Treaty of Union it was specially reserved that no judgment of the Court of Session before the Union should be reversed after the Union by a British tribunal. On the same point he wished to maintain the Resolutions of that House that had been adopted by their Lordships as Standing Orders. Thirdly, he wished to try and remove an imputation under which one whom he must regard as a co-Peer had been lying for some years—namely, that he had assumed a title which was not his by just inheritance. He hoped to be able to show their Lordships that that imputation should be removed; and, further, he was anxious, by these Resolutions, to get their Lordships to show their determination to maintain the integrity of the Scottish Peerage as it appeared on the Union Roll, and as it at present stood as shown by the Reports of the Lords of Session at the command of their Lordships' House at various times—first, in 1708; secondly, in 1739-40; thirdly, in 1760, as well as at subsequent dates. To make his Resolutions intelligible, however, he should be obliged to ask their Lordships to bear with him while he related one or two historical facts which were undisputed, in order that they might really appreciate the case he had to put before them. In the year 1715, when George I. was on the throne, the Earl of Mar, with many Scotch Peers, was attainted of high treason. In the year 1824, an Act of Parliament called the Restoration Act removed that attainder; but before that Act was passed, it was remitted to the law officers of the Crown—one of whom was the Attorney-General, Sir John Copley, afterwards Lord Lyndhurst, and another the Lord Advo-

cate of Scotland—to investigate whether John Erskine of Mar was able to make himself out heir of line to the attainted Earl. This was answered in the affirmative by the law officers of the Crown. It was stated that he had satisfactorily made out his pedigree. In his favour, therefore, it was that this reversal of attainder was given. Incredible as it might seem, it was to the grandson of this attainted Earl that this act of grace was given, although 109 years had elapsed since the attainder. But, it might be asked, How was the Report in favour of the grandson? He (the Earl of Galloway) said, it came to the grandson through his mother—and he begged their Lordships to take note of this. Now, the whole of this question lay in whether the remainder was to heirs-general or to heirs-male, and in this case he was declared in the Act to be grandson, and the lineal descendant of the attainted Earl, through his mother, Lady Frances. Their Lordships might imagine that this circumstance should be conclusive; but he believed it was said that this was only a description of the grantee, this John Erskine of Mar, who had his title restored, and it was said that it was in consequence of his mother happening to marry a collateral heir-male of the family that he was really awarded this restoration title. He thought the best proof he could give of that was this—that this restored Earl had in his father's lifetime, and after his mother's death, succeeded to the estates in virtue of which he held the title; so actually he had been in possession of the estates during his father's lifetime, in consequence of having succeeded to his mother as heir of line. He hoped he should not be trespassing on their Lordships' indulgence in giving them a still stronger proof, which he found in the short debate that took place when this restoration was being made. Sir Robert Peel, who was then Mr. Secretary Peel, introduced this Bill for the reversal of the attainder in the other House. He said :—

“He moved the first reading of five Bills for the reversal of attainders—first, in the case of Lord Stafford, as a reparation for an act of injustice. The restoration of the other titles, however, stood upon a different footing, for they were all acts of grace and favour. In addition to Stafford's Bill, he proposed the second reading of Bills for reversing the attainder of the Earl of Mar, Viscounts Ker and Strathallan, and Baron Nairn.”

The point he (the Earl of Galloway) wished particularly to draw their Lordships' attention to was this—that in the debate which took place, after various complimentary remarks had been made by Mr. Abercrombie and Sir James Mackintosh, Captain Bruce on that occasion said that—

“With the warmest approbation of the principle of these Bills, he could not praise that selection which took the taint from the blood of the lineal descendants of the parties who had first suffered, while the collateral

branches of others whose descent was pure in their own line were still thought fit to be excluded from His Majesty's grace. Such was his own case. When His Majesty was in Scotland he had felt it his duty to present a petition for the reversal of this family attainder, and he had never heard since why this partial restoration of honours was selected. His (Captain Bruce's) blood collaterally descended from Lord Burleigh, who died without issue, whose descent was pure and untainted, and yet he was excluded from Royal grace."

This went to show that if he had not been heir of line the reversal of attainder would not have taken place. Lord Binning concurred, especially as by the old Scotch law the claims of a collateral branch were not escheated by forfeiture. He added some words expressive of the unaffected pleasure it gave him to see the illustrious house of Mar restored to it honours. Mr. Secretary Peel, in replying, said he was much satisfied with the approval evinced, and said—

"There remained two modes of proceeding, either an indiscriminate reversal of all attainders, or a selection. To the first mode were found objections almost insurmountable, and, indeed, some persons lineally descended had not, on considerations of property, wished for an extension of the bounty to them. Restoration of blood was not, in the language of the law, a matter of grace and favour. As accidentally the Bill for the reversal of the attainder of the Earl of Mar was the last brought in, he begged just to remark that that Earldom was one of the most ancient in the kingdom, and, according to Lord Hailes, existed before any records of Parliament."—[2 *Hansard*.]

He had quoted these remarks to show that he was not now dealing with the modern title of 1565, and to show that the title on the Union Roll was still in force, and had not been taken away. He did not know that it could be taken away by Act of Parliament—certainly not with them in Scotland—and he wished their Lordships to grant a measure of indulgence, while he showed why it was that this grandson of the attainted Earl, lineally descended through his mother, was reinstated, and why it was, being reinstated, that he was declared restored to his old family honours, so ancient and illustrious. He would do this by pointing to the circumstances that induced those who made up the Union Roll of Peers in 1605-6—the only time when the old nobles of Scotland were ranked according to their precedence—to put the Earl of Mar where he was on the Union Roll, and where he had stood since that time. When this ranking took place, as their Lordships might be aware, every Scotch noble was directed to produce every document that would show his proper place in respect to precedence. There were then no dates ostensibly attached to Scotch Peerages. An erroneous idea had got abroad that because the date 1457 was put against the Earl of Mar, therefore he could not have shown any document for precedence previous to that

year; but that impression was entirely fallacious. What the Earl of Mar produced in 1605-6 to show that he was entitled to the precedence awarded to him was, first of all, a charter of Isabel, Countess of Mar in her own right, dated 9th December 1404. He did not refer to the one dated August of that year, which was afterwards declared null and void by the Scotch Parliament, but the later one. In the second place, there was King Robert's charter affirming the same, and tracing the peerage through Isabel to Robert Earl of Mar, in 1438, and also the Act of Parliament of 1587, along with other documents. When the Earldom was restored in 1824, it was restored by an Act passed by virtue of his direct succession from Isabel Countess of Mar. But he (the Earl of Galloway) would not trouble their Lordships with the other Acts. He would rather content himself with asking them to mark the quotation from the Act of 1824, for the reason that there were some who held that although it was perfectly true that the restored Earl, in 1824, was restored as the lineal descendant and grandson through his mother, yet that there was nothing in that Act which led to the conclusion that it was to go in remainder to future descendants as heirs-general. The quotation read that:—

“Whereas, by an Act passed, John Francis Erskine, Earl of Mar, is the grandson and lineal descendant of the said Earl of Mar, that the said John Francis Erskine, and all the persons who would be entitled, after the said John Francis Erskine, to succeed to the honours, etc., . . . as fully and honourably as if the said Acts of Attainder had not been made.”

It was intended that the Act of Attainder should be reversed, and that the family of Mar should be restored to the same position as they occupied before the year 1715. He should be surprised if their Lordships did not agree to that proposition, as he thought it was too plain and manifest that that was the intention. In 1824, the grandson was restored, and the following year, 1825, he was succeeded by his son, who in 1828 also died, and was succeeded by his son. Up to that time, he would mention, the succession went as Earl of Mar. There was no doubt that he was entitled to the title of Kellie, which became vacant a year after he succeeded to the Earldom of Mar. But the Earldom of Kellie being a title somewhat lower down, it was thought by the ninth Earl of Kellie, who died sometime previous, that the Earl of Mar might not care to acquire the lower title also. The late Earl of Mar, however, did claim the title of Kellie, and it was adjudged to him in 1835. Thenceforth he bore the title of the Earl of Mar and Kellie, and he was the only Peer of that title that had yet existed. The Earl having died in the year 1866, brought matters down to the time of the present unfortunate discussion. In the year 1866 the Earl was succeeded by his sister's son, John Francis Erskine Goodeve

Erskine. During the late Earl of Mar's lifetime his nephew had always been looked upon as his heir, and in proof of the peerage having descended to him through the female line four centuries and more back, he himself protested that he was premier Earl. He further enjoined upon his nephew that when he succeeded the same protest was to be made—namely, that he was premier Earl. He would there point out to their Lordships that John Francis Erskine was exactly the same relation to the son of the restored Earl as the restored Earl was to the attainted Earl—namely, grandson and lineal descendant, through his mother bearing the same name, Lady Frances. Thus he was heir-general to his uncle, according to the Scotch law, the same way as his relative, Colonel Erskine, succeeded as heir-male to the title of Kellie. Then he was presented at Court as Earl of Mar, and his vote was taken over and over again as Earl of Mar at Holyrood. Moreover, his cousin, Earl of Kellie, continually addressed him as Earl of Mar, wrote to him as such, and received him at his house as Earl of Mar. Indeed, there was no question about the matter of any sort or kind, and it was more than a year afterwards when a change came over the spirit of his (Earl of Kellie's) dream. On one occasion, when the Earl of Mar's vote was recorded, and accepted, as usual, at Holyrood, it was protested against in their Lordships' House as void by the Earl of Kellie. The question, therefore, came before the House whether the Earl of Kellie's protest was thought admissible. This was decided against the Earl of Kellie, and the Earl of Mar's vote was accepted as valid, and nothing had occurred since that time in the least way to challenge the validity of the vote. In the following year, 1867, the late Earl of Kellie began to lodge cases in their Lordships' House, claiming to be Earl of Mar. He was never ready, however, to proceed with those cases, and the House was constantly prevented from proceeding with them, on account of being constantly asked to wait for more and more evidence. The Earl of Mar immediately presented a petition as Earl of Mar, asserting his right to the title, and protesting against the claim of the Earl of Kellie. It was in the year 1871 that the Earl of Kellie's counsel announced in their Lordships' House that he was prepared, or that he would be prepared in the following session of 1872, to go on with this case. In January 1872, however, the Earl of Kellie died, and of course that ended the case for that session. But then, he was sorry to say, that the late Earl's son and successor, the following year, 1873, produced another case. If he (the Earl of Galloway) remembered right as to the position of the matter, at that time the son was not himself prepared or ready to proceed. The case was, therefore, held over or dropped, and in the year 1874 a second

case was lodged, and he would mention that the petition of the Earl of Mar had been lying in their Lordships' House during those years waiting to be heard against the cases that had been lodged. He wished further to explain that the Earl of Mar had never been a claimant. It had been said that he had been a claimant; but he was in a position to entirely deny that assertion. He simply acted in a constitutional manner in coming to their Lordships' House and taking the action he did. He succeeded as heir to his uncle, and the only possible way in which he could be put out of his position was by some other claimant coming in, and claiming, not a title which was not upon the Union Roll, but his title which was upon the Union Roll. The case in question was tried; but before it was tried in the year 1873-74, the opinion of the law officers of the Crown was requested as to the right of claim put in by the Earl of Kellie to the Earldom of Mar. He would ask their Lordships' indulgence while he read the opinion of the law officers of the Crown upon the matter. But first he would remark that there was a change of Government at the beginning of the year 1874, which their Lordships would remember, and so, by a chapter of accidents, in 1873 the matter was relegated to the law officers of the Crown under Mr. Gladstone's Government, and the case not coming on, it was further relegated to the law officers of the Crown under Mr. Disraeli's Government of 1874. It was a fact, however, that the law officers of the Crown of 1874 held the same opinion upon the subject as the law officers of the previous Government. Therefore, the law officers, both Scotch and English, in 1874 indorsed the opinions of those of 1873. It was insisted in their Report, over and over again, that the succession to the Earldom of Mar should continue through the female line, and allusion was made to a charter of Queen Mary, in which the words were used "restored to heirs-general in 1565 continuing." The law officers of the Crown then continued—

"It was immaterial, however, to consider whether there was a re-creation or a restoration to the dignity of Earl of Mar in 1565, inasmuch as if it was a re-creation, the surrounding circumstances were sufficient to indicate the intention that the dignity should descend to heirs-general and not be limited to heirs-male. On the other hand, if it was a restoration of the previous dignity" [as they upheld], "there is sufficient evidence to show that it is in like manner descendible to heirs-general, and hence that the heir-male, Lord Kellie, has not made out his claim to the dignity of Earl of Mar, in the Peerage of Scotland."

He need not remind the House of the terms of the Act of 1824; but he desired to advert to what was technically called the judgment of the Committee of Privileges. He wished to say one or two words about that matter, because it had been wrongly held

that the Committee of Privileges was identical with the final Court of Appeal. He was quite certain that he only had to appeal to the noble and learned Lord on the woolsack to corroborate him when he said that the Committee of Privileges stood in the light of a court of advice to their Lordships' House. When petitions were presented to their Lordships by the Crown for their advice, they were generally referred to the Committee of Privileges, who advised the House as to what course should be taken thereupon. And what was the judgment, so called, upon the matter in question, which the Committee of Privileges put forth? It was as follows :—

“Resolved, that it is the opinion of this Committee that the claimant, Walter Henry Earl of Kellie, Viscount Fenton, Lord Erskine, and Lord Dirleton, in the Peerage of Scotland, hath made out his claim, etc., to the honour and dignity of Earl of Mar in the Peerage of Scotland, created in 1565 ;” and “that report thereof be made to the House.”

He wished the House to observe that it was an opinion of the Committee that it was the creation of July or August 1565, because in the elaborate speeches made by the learned Lords on the occasion, it was specially stated that no weight was to be put upon the charter of Queen Mary of the 23d of June 1565. That charter they implied had nothing whatever to do with the case. They avowed that “there was not a tittle of evidence to guide them in forming an opinion ;” and they said it was evident that the earldom must have been created between the 28th July and the 1st of August. Therefore, putting on one side and upsetting the validity of the charter of Queen Mary as they did, it was not for him to call into question the Resolution of the Committee of Privileges, and he did not intend to say whether they were right or wrong. He would reserve that to himself. The opinion of the Committee of Privileges, technically called a judgment, was not in his opinion—and he wished to enforce the point upon the consideration of the House—of any actual judicial importance. It was specially stated that it was not a judgment, but only an opinion, and that should be made clear, because the Resolution of the Committee being taken as a judgment stood in the way of the vote of so many in their Lordships' House. The opinion was recorded on the 25th of February 1875, and was reported to the House and sent to the Lord Clerk Register on the 26th of the same month. He was surprised that the matter was carried out in such an informal and hurried manner. After this, the Earl of Mar, the heir-general and nephew to the late Earl who died in 1866, attended at an election of Representative Peers at Holyrood, and offered his vote as a Scottish Peer on the Union Roll. He

was shocked to say this was refused by the Lord Clerk Register. This refusal was, he thought, an illegal act on the part of the late Sir William Gibson-Craig. The Earl had as good a right as any other peer in Scotland to record his vote on that occasion, notwithstanding this very remarkable Order sent down to the Lord Clerk Register. If the Order was not intended for the Earl of Kellie in respect of his comparatively novel peerage of 1565, it was ambiguously worded; but if that Order was intended to relate to this Earl of Kellie who had just been given his new creation of Earl of Mar, it was, he had no hesitation in saying, *ultra vires* of their Lordships' functions. It was a legislative act which could only be performed by the whole of the Estates of the Realm. A right to vote was possessed by one Earl; but to give an Order in consequence to the Lord Clerk Register to accept his vote as a peer upon the Union Roll of another date than that of his peerage was a legislative function which, with all due respect to their Lordships, he said was not within their Lordships' prerogative. It was, therefore, an informal Order without precedent, and also an illegal Order. In addition, there were eight Peers aggrieved by this Order. If the Earl of Kellie, who had just been given this new title, was empowered to vote in respect of the Earldom of Mar on the Union Roll of Scotland which had not been awarded to him, those seven or eight peers were aggrieved whose peerages came in precedence between the old Earldom of Mar on the Union Roll and that accorded to the Earl of Kellie, and accordingly more than half of these immediately protested against what had been done. These protests had been going on since, and had been increased. Each year they would increase until some notice was taken of their protests and right was done them. He would have wished, had there been time for it, to call attention to the Report of the Select Committee appointed in 1877, to show that there were no precedents for altering, as they had done, the precedence of the Union Roll. The Lord Clerk Register of Scotland had been ordered again and again to send a return of the Roll of Scotch Peers, and it had always come back in the same way. In the year 1739-40 the House of Lords ordered the Lords of Session to make up a Roll and send it to the House. The Lord Chancellor in 1740 acquainted the House of Lords that the Roll had been received. Their Lordships had ordered also a Report as to the limitations of Peerage, and the Lords of Session replied that they had great difficulty in answering that part of the Order relating to the particular limitation of peerages, and were only able instead to make the following remarks, to which he called the special attention of the Chairman of Committees:—

“First, they take the liberty to remark that they cannot discover the

records of any patent of honour created at a period earlier than the reign of King James VI.,”

who followed Queen Mary.

“Before that time titles of honour and dignity were created by erecting lands into earldoms and lordships.”

He must be permitted, as regarded this creation, to quote what was written in *Hansard* as having been said by his noble and learned friend who was on the woolsack last year, and also one remark of the noble and learned Lord now on the woolsack. The late Lord Chancellor (Earl Cairns) remarked last year—

“All I have to say is this: that the peerage on the Roll which is called the Mar Peerage is not the peerage which has been attached in this House to the Earl of Mar and Kellie; and, therefore, the Earl of Mar and Kellie should not be allowed to answer in this call.”—[3 *Hansard*, ccxlviii. 137.]

The present Lord Chancellor said, on the same occasion—

“The House has decided that a peerage of Mar was created by Queen Mary, and that the peerage so created belongs to the Earl of Kellie; but it has pronounced no judgment, either affirmative or negative, with respect to the ancient Earldom of Mar.”—[*Ibid.* 146.]

This Order was, therefore, as he had shown, utterly at variance with the recorded opinion of the Committee of Privileges as to the awarded claim of the Earl of Kellie; and he maintained that the Earl of Mar, who succeeded his uncle, would be defying the Resolution and Standing Order of this House if he came and made his claim at the bar of the House. This heir to the old Earldom of Mar was exactly in the same position as every one of the Scotch Peers; and until some one made a protest against his being the rightful heir to the title as he was, being indisputably the heir of his uncle, it was their duty to acknowledge him as Earl of Mar. What he wanted to place before them was this: Supposing the Earl of Mar were, in defiance of the Standing Orders of this House, to come and claim at the bar the concession of his right, he could not imagine there would be much doubt as to the result. It was undoubted that he could show the charters, Acts of Parliament, and other deeds, which must convince the law officers of the Crown that he was the rightful heir to the old title. It was impossible to think that that House would be likely to reverse the old Acts of the Scottish Parliament and the judgments of the Court of Session, and to override the opinion of the law officers of the Crown and the Act of the Imperial Parliament of 1824. It was inconceivable that if the Earl of Mar came and made that claim the noble and learned Lords in that House would adopt such an extraordinary course. They would have to concede his right: but the fact of their doing so would not interfere with the rightful

position of the Earl of Kellie. He would still be in the same position as he now was with respect to the peerage of 1565. He had intended to bring some additional details before their Lordships; but he really thought it was unnecessary. He must, however, remark that he was suffering very great disadvantage from the fact that many noble Lords who took a great interest in this question were, unfortunately, obliged to be absent. There was Lord Crawford, the Marquess of Bute, and the Earl of Stair, besides Lord Napier and Ettrick, who had protested over and over again against what had been done at Holyrood. These noble Lords were all absent, and the Duke of Marlborough—who was interested in a Scotch title his ancestors held before they ever had an English one, but which, not being descendible to heirs-female, he no longer possessed—had not been able to be present. There was a great deal of delicacy of feeling amongst the Peers in this House about this question, as it seemed like making a sort of attack upon the judgment of the House of Lords. This he disputed, and having looked into this question very carefully, which, as it happened, he had done at the request of his noble friend the Earl of Kellie, who was interested so deeply in it, he had come to the determination that, whatever obloquy he should receive, he would be true to the traditions of his order, true to his co-peers in Scotland, and true to this House of Parliament, and put before their Lordships what he thought was the right view of the case. He thought he had conclusively proved his case to their Lordships; and he would ask them to uphold the laws of the country, to uphold the Standing Orders of this House, and to acknowledge one of their co-peers who had indisputable rights which they were bound to recognise. He earnestly asked them to put aside the idea that they were acting against the law in any way, or against precedent, in giving effect to his Resolutions in sweeping away the Order to the Lord Clerk Register. He found that his claim to their Lordships' support, in behalf of his second Resolution, rested on the Standing Order of the House, which had become a Standing Order, at the instance of the noble Duke (the Duke of Buccleuch), who, in 1862, induced the House to rescind Lord Rosebery's Resolution of 1822. With respect to this second Resolution, it had no effect one way or another except that it announced the Standing Order of the House with respect to Scotch Peers, for the Earl of Mar had no more business to come to the Bar of that House to make claim to his title than had any other Scotch Peer. That was done by another ceremonial altogether in Scotland. He prayed that his noble and learned friends the late and the present Lord Chancellors would look fully at the question, and he would venture to say they would find the difficulties could only be

aggravated by not getting rid of this Order of the House to the Lord Clerk Register, which was the subject of his 1st Resolution; and, by accepting the second Resolution, the noble and learned Lords would be only accepting a Resolution which embodied what was at this moment a Standing Order of that House. The noble Earl concluded by moving the Resolutions of which he had given notice:—

*Moved* to resolve, That whereas the Select Committee appointed “to consider the matter of the petition of the Earl of Mar and Kellie, presented on the 5th of June 1877” (the prayer in which petition was that the title of Earl of Mar should be brought down to the date of 1565 from its existing place on the Union Roll), “and the precedents applicable thereto,” reported to the House on the 27th July 1877 “that they had not been able to discover any precedents of Orders made by the House for altering the order of precedence of the Peers of Scotland on the Union Roll,” and further, “that they were not disposed to recommend that any Order should be made on the petition of the Earl of Mar and Kellie;” in order to give due effect to the recommendation contained in this Report, it is incumbent upon this House to rescind their Order of 26th February 1875, which ran as follows, viz.: “That at the future meetings of the Peers of Scotland assembled under any Royal Proclamation for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar according to its place on the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings of such election.”—(*The Earl of Galloway.*)

THE LORD CHANCELLOR said the noble Earl who had just addressed their Lordships had no occasion to apologise for bringing this question before the House merely because it was a Scotch question. The attention of the House had shown that it was an interesting question to many of their Lordships. He entirely sympathised with the historical interest which attached to it in the minds of many of the Scotch members of their Lordships' House, and also with the personal feelings which his noble friend had expressed towards the gentleman whose claim he had so ably advocated. The only thing which he could not help regretting when he heard his noble friend was, that he was not addressing the rather more limited assembly of their Lordships' House which met at an earlier hour of the day, and that he was not clothed in habiliments similar to those in which he (the Lord Chancellor) was obliged to address them. The speech would have done credit to an advocate at their Lordships' bar. What the noble Earl had done was to invite their Lordships to deal judicially with a question which had not come before them in a judicial manner, and to supersede entirely the established usage and practice of their Lordships' House in respect to the proper manner of dealing with judicial questions. He had not the least doubt of the sincerity of his

noble friend when he said that his object was to uphold the laws of the country, and to maintain the authority of the Orders of their Lordships' House. He hoped the noble Earl would think him equally sincere when he said that if they were to take the advice which the noble Earl had given them, the result would be to subvert the laws of the country, and the order and usages of their Lordships' House. The noble Earl had dealt with two distinct subjects; and he would say, before he made the few observations he thought it his duty to make upon these subjects, that he would rigidly abstain from entering into the merits of the legal questions with which the noble Earl had dealt. The motion dealt with two subjects—one, the right to a certain peerage, and the other, a right to a certain precedence upon the Union Roll. The more important of these subjects was the title to the peerage, and that, he supposed, was the main object which the noble Earl had in view. The noble Earl asked their Lordships to adopt a Resolution by which they would declare that—

“ John Francis Erskine, being the nephew and undisputed next of kin of the late John Francis Miller Earl of Mar (who died in 1866), and having observed the forms usually complied with by Scotch Peers on succession, is entitled, in accordance with the protest made by many Peers at Holyrood, to remain in enjoyment of the privileges he inherited as tenant, *de jure* and *de facto*, of the Earldom of Mar, standing on the Union Roll of Scotland, no other person laying claim to that same earldom, and the said earldom having been in no way affected by the Resolution of this House on 26th February 1875, which conceded to the Earl of Kellie an Earldom of Mar of the date of 1565.”

This was to declare that this House, sitting in its legislative capacity, without any reference from the Crown, and without any opinion by a Committee of Privileges, could properly assert that the noble person named—for undoubtedly he was noble by birth, and he was quite willing in courtesy to call him so—the Earl of Mar, though not yet recognised by their Lordships' House, was entitled to all the rights appertaining to that Earldom, including those of a vote and a certain precedence at the election of Representative Peers in Scotland. He (the Lord Chancellor) ventured to say, that such a motion was absolutely unprecedented in any case of either an English, Scotch, or Irish Peerage. He need not remind their Lordships of the course which was invariably taken when a claimant, finding his right to be a subject of controversy, took means to establish that right. He petitioned the Crown to declare his right. The Crown referred that petition to their Lordships' House, and the House sent it to the Committee of Privileges, according to their invariable usage and practice, because the matter required to be dealt with in a judicial manner, and upon judicial principles. That Committee comprehended all the legal

ability in their Lordships' House; but it was not confined to lawyers. It comprehended those who were accustomed to attend to the business of the House, and any noble Lord who was desirous of attending was as much at liberty to do so as any other. That was the constitutional way of dealing with a question of this kind; and he must confess he was a little surprised when he heard the noble Earl, who had evidently taken great pains to inform himself on this subject, say it was an unconstitutional thing, and a defiance of some supposed standing Order of their Lordships' House, for a Scotch Peer who claimed a title which was the subject of controversy to seek to establish his right to the title by a petition to the Crown, which could be referred to the Committee of Privileges. The noble Earl had given no reason for that extraordinary opinion. The thing was constantly done. When a person claimed a Scotch peerage by remote collateral succession, or when any other circumstances raised a doubt or controversy, he petitioned the Crown; and the Crown, as a matter of course, referred the petition to the House, and the House, equally as a matter of course, sent it to the Committee on Privileges. And if the noble person whose cause the noble Earl had advocated desired this course to be adopted, it was perfectly competent for him to do what he had described. He would not by so doing be contravening any Order of their Lordships' House, and he thought it would be the natural and the prudent and proper course to adopt. The only ground for that singular opinion of the noble Earl was an Order made some years ago by the House, on the motion of a noble Duke (the Duke of Buccleuch) to the effect that in certain circumstances, where a person succeeded to a peerage by collateral and not direct descent, he should come to that House and establish his right before his vote was admitted at Holyrood. About ten years after, this Order, for reasons which the noble Duke would, no doubt, himself state to the House, it was thought right that it should be rescinded; and the consequence was that at the present time there was no Order of their Lordships' House which prevented any claimant to a peerage in Scotland from assuming the title and claiming to vote at the election of Representative Peers. But it was quite a *non sequitur*, his noble friend would allow him to say, to suppose that because no such claimant was obliged to come and so establish his right, that his right was to be taken as capable of being otherwise established when the claim was matter of controversy. In point of fact, they all knew that many such claims had been made, and many such had been admitted, as far as voting at Holyrood was concerned, which were wholly and absolutely unfounded, and in which the position of the claimants was extremely different from that of the noble person here concerned. But to say that in every

case of the assumption of a title which was in controversy, and where there was a serious legal doubt, their Lordships' House should declare off-hand who had the right to it, was a proceeding quite inadmissible. There was another course which might be pursued, and that had been pointed out in the Report of the Select Committee of their Lordships' House which sat in 1874. He could not imagine why that course had not been taken. It was there pointed out that in an Act of Parliament passed in 1847 there was a provision settling the mode of proceeding when any question of this kind arose. The solution so prescribed by the Statute law of the realm was, that if a right to vote was claimed at Holyrood in an election of Representative Peers, and any two peers should protest against that vote, the matter must be reported to the House of Lords, and the House must deal with it. It would call the person who claimed to vote to substantiate his right, and if he did not come forward and do so, or if he failed to do so when he did come forward, he was, by the Statute law of the realm, to be for ever excluded. The Committee of their Lordships' House decided that that was the natural way of bringing any such claim to the test. Why had not this been done? The noble person who claimed to be the ancient Earl of Mar had not, as far as he (the Lord Chancellor) was informed, since that Resolution was passed, tendered his vote at the election of Representative Peers. An election was held at Holyrood only the other day. If he had done so, he thought it highly probable that two peers would have been found to enter a protest against receiving that vote, if only for the sake of having all ambiguity on this question cleared up. He could not think that the friends of that gentleman, who, having that mode of establishing his right, had, for whatever reason, not thought fit to take a step which would have made it possible to establish it, were now entitled to come to their Lordships' House and summarily declare that, without hearing evidence, or the arguments of counsel, or going judicially at all into the matter, their Lordships should assume his right to the title, and act as if it had been proved before them. In regard to the Report of the Committee on Precedence, although the Committee did not think it necessary or expedient to say that their Lordships could not, under any circumstances, deal with the question of the Union Roll of the Peers in Scotland, they had pointed out that there was no example of any such thing having been done. On that Union Roll and on the earlier Decreet of Ranking of the Commissioners of King James VI. from which it was made up, there had been placed, and there had remained since 1606, in the order in which it now stood, the Earldom, and only one Earldom, of Mar. Whether it was

rightly placed there or not might be a matter of controversy. He thought it would not be easy to reconcile its exact place on that Roll, either with the date of the first creation of the ancient peerage, or with that of the peerage which the House found to have been created by Queen Mary in 1565. But what he wished to point out was this—that whether that precedence was or was not capable of being reviewed and altered by some competent authority—if their Lordships were that authority—they could only exercise such a power after a petition was presented to the Crown, and referred by the Crown to their Lordships' House, and they could only exercise it judicially, as they would deal with every other question as to dignities or honours so referred to them by the Crown. If the matter were to go before their Committee of Privileges, all the materials relating to it would be brought before the Committee, and, no doubt, it would be duly and properly considered. He rested his objections to the course now proposed on this fact, that there was on the Union Roll only one Earl of Mar; there had never been more than one, and it must be determined judicially that there existed another Earldom of Mar before their Lordships could rescind the Order and adopt the motion, which proceeded essentially upon the assumption that there was another. For these reasons, and feeling that their Lordships could not properly enter further into the merits of the case, he should resist the motion before the House.

THE EARL OF MANSFIELD said, The difficulty was this—that their Lordships' House had given an Order which there was great difficulty in following out. First of all they had decided there was a peerage which nobody ever heard of before, the Earldom of Mar of 1565. They could not dispute the validity of that proceeding, though the majority of persons in Scotland believe no such peerage existed. On the former occasion on which this subject had been discussed, he had thrown out a challenge to any noble Lord to show one single tittle of evidence in any document drawn from history that such a peerage existed, and the challenge had not been met. How did the matter stand at present? At the election of Peers in Holyrood the Earl of Mar was called. A noble Lord got up and claimed to vote in respect to that title, which was founded in 1457; but his title was admittedly the later one, said to be created in 1565. How could they possibly reconcile this claim? When a protest was made against his vote being received in respect of the old Earldom of Mar, the Lord Clerk Register said—"I have received an Order from the House of Lords, and I must obey it." Now their Lordships ought to rescind that Order. The noble and learned Lord on the woolsack said there was no precedent for rescinding that Order; but he

forgot that the Order of the House was rescinded in 1864. Many noble Lords who spoke on this subject on the last occasion were perfectly ignorant not only as to the theory and the law, but as to the practice of the law of Scotland; and he wished that such cases were referred to the Court of Session, where they were acquainted with the Scotch law. He intended to support the Resolutions of his noble friend.

THE MARQUESS OF HUNTLY said, that, though this might be a very dull matter to English Peers, it was a question which Scotch Peers thought very strongly about, and which effected the position of every Scotch Peer at that moment. He had not intended to take part in that debate, having made some observations upon the case on a former occasion; but, as a Scotch Peer, he objected to the remarks of the noble and learned Lord on the woolsack, when he said that the Earl of Mar should have tendered his vote at Holyrood, that two peers should have protested against his vote being received, and that then the Earl of Mar should come and claim his rights in that House. A large minority of Scotch Peers had already protested against the Earl of Kellie's vote being received as Earl of Mar, and that noble Earl should be called upon to come and prove his right to such vote. All that these Resolutions would do was to rescind the Order which had been made; and if they were agreed to, he would have to come to prove such right. He protested against the Earl of Kellie giving a vote in the peerage of Scotland, which had not been adjudged to him. There was a question whether it was necessary for Scotch Peers to come to that House to prove their right or their claim to vote. Many Scotch Peers had not been required to do so. He would suggest that the matter should be referred to a Select Committee.

THE EARL OF CAMPERDOWN said that the two Resolutions were not quite consistent. There were many persons who might find themselves able to vote for one when they could not vote for the other. That was the position in which he found himself placed. He could not vote in that House that Mr. John Francis Erskine was entitled to the Earldom of Mar, because the House would obviously in that case be acting without any evidence before it, and in a judicial manner. He would therefore suggest that the noble Earl opposite (the Earl of Galloway) should withdraw his second Resolution. With regard, however, to the other Resolution, as to the question of precedence, he thought there was a good deal to be said in favour of the case put before their Lordships by the noble Earl opposite. He asked the House to rescind an Order of the House; and if the House could send down an Order it could rescind it. What had been the effect of

the Order? It was virtually a direction to the Lord Clerk Register to accept the vote of the Earl of Kellie as Earl of Mar. At the present moment the Earl of Kellie, whenever there was an election of Representative Peers of Scotland, voted as Earl of Mar, and in virtue of a peerage of 1450, to which he had never ventured to lay claim, and which was the peerage which Mr. Erskine did claim, and which he was entitled to according to the findings of the Scotch Courts, whatever those findings might be worth. If Mr. Erskine wished to prove his title conclusively he must come to that House. But that was no reason why the House should not rescind the Order which gave the Earl of Kellie the privilege of voting in virtue of a peerage to which he laid no claim. If the noble Earl opposite would withdraw his second Resolution he should have much pleasure in voting with him.

LORD INCHQUIN said, that even if the course recommended by the noble Earl opposite (the Earl of Camperdown) were followed, their Lordships by agreeing to the first Resolution, would virtually declare that Mr. Erskine was entitled to the Earldom of Mar without having heard the evidence on which his claim was founded. He thought that was a most irregular course, and one which the House could not adopt.

THE DUKE OF BUCCLEUCH said, that as he had been referred to during the debate, he might say that he obtained in 1862 the abrogation of the Order passed at the instance of the late Earl of Rosebery in 1822 because it did not work well. The question was, Who was Earl of Mar? The earldom claimed by the Earl of Kellie was the Earldom of Mar on the Union Roll. Now, very few of the peers on the Roll were placed in their proper position. As he understood, the Union Roll was so named, because it was the Roll of Peers called for by that House, after the Act of Union between England and Scotland was passed. It was the Roll of Peers who were called to the Scottish Parliament. He thought Scotch peers should be called upon to go through every form which an English or an Irish peer went through when he succeeded his father or a collateral inheritor. They ought to prove their right on petition to the Crown, when it would be referred to that House, and then to the Lord Chancellor; and if everything were found by him to be in order he would report to the House; but if not it would be referred to the Committee of Privileges for the matter to be judicially considered.

LORD HOUGHTON questioned the fitness of the Committee of Privileges to determine the points relating to the disputed Earldom, and argued that they could only be decided after a serious historical inquiry.

LORD BLANTYRE said, surely if John Francis Goodeve Erskine

ought to prove his succession to the old title of Earl of Mar, the Earl of Kellie was equally bound to do so. It was undisputed that the old Earldom of Mar, which owed the high place it did on the Union Roll from the date 1457 being attached to it, passed to heirs-general (female as well as male), and that John Francis Goodeve Erskine (not the Earl of Kellie) was heir-general and next of kin to the late Earl, who died in 1866. Lord Kellie had not claimed any title of earlier date than 1565, because there was a nearer heir than himself to the old Earldom of 1457 on the Union Roll.

THE EARL OF GALLOWAY, in reply, said, as far as he could follow the arguments, they only gave reasons why the Resolution standing on the paper should be accepted. He asked their Lordships to rescind the Order of February 26, 1875, in order to clear the atmosphere. He must take exception to what the noble and learned Lord on the woolsack had said when he referred to the Earldom of Mar, said to have been created in 1565, and said Mr. Goodeve Erskine was a "claimant." He never was a claimant, and no one in the House could show a reason why the Earl of Mar should be put in a different position from any other Scotch peer in the House. He wished again to say that he did not put any stress on the second Resolution, as it would not help the question one way or the other; but he could not follow what his noble and learned friend on the woolsack said, nor see any reason why their Lordships should not accept the first Resolution. He would withdraw the other, after the general support he had been accorded on both sides of the House. If the first Resolution were not accepted he would certainly go to a division upon it.

On Question? Their Lordships divided :—Contents, 49; Not-Contents, 41: Majority, 8.

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Portland, D.	Zetland, E.
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Haddington, E. [ <i>Teller.</i> ]	Beaumont, L.
Jersey, E.	Blantyre, L.
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Manvers, E.	Calthorpe, L.
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Dorchester, L.	Northwick, L.
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Elgin, L. ( <i>E. Elgin and Kincardine.</i> )	Skene, L. ( <i>E. Fife.</i> )
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*Resolved in the Affirmative.*

## No. VI.

## DEBATE IN HOUSE OF LORDS.

*(From Hansard's Parliamentary Debates.)**June 21, 1880.*

THE MARQUESS OF HUNTLY.—I wish to put to the noble and learned Lord on the woolsack a question of which I have given him private notice. I wish to know, Whether any intimation had been made to the Lord Clerk Register, in accordance with the Resolution adopted by the House, relative to the Earl of Mar Peerage, on the 14th instant?

THE LORD CHANCELLOR.—I believe no intimation has been made, and that none properly can be made, to the Lord Clerk Register with regard to this Resolution. The Resolution adopted by the House was—

“It is incumbent on the House to rescind their Order of the 26th February 1875.”

Before the House can rescind that Order there must be a motion and a vote to do so. There has been no such vote passed; and if any noble Lord should propose one, I must assume that he would come prepared to recommend to the House the adoption of what he may consider a more proper form of Order to be substituted for that which has been made. The Order that was made was consequential on a judicial act of the House, founded on a Report of the Committee of Privileges; and if that is rescinded, beyond all question some other must be made. I hope that any one who moves such Order will consider whether it shall be in a form which will put on the Union Roll of Scotland two Earldoms of Mar, or in a form which, leaving only one Earldom of Mar, will change its precedence, and whether there are not objections of the gravest character to either of those courses.

THE EARL OF GALLOWAY.—My Lords, I gave notice—a full fortnight's notice—of my intention to move that the Order be rescinded, and that was fully debated on Monday last. I had originally put down, “and it is hereby rescinded;” but I afterwards thought that would be rather offensive in form, and I

considered that if the House adopted the Resolution, saying that it was "incumbent on them to rescind the Order," that was virtually the same as saying they intended to rescind it; and, therefore, I still hold that the division that took place a week ago was, to all intents and purposes, a decision of the House that the Order should be rescinded. Of course, after what has fallen from the noble and learned Lord on the woolsack, all I can do is to give notice that on the first available day I shall move that due effect be given to the motion of Monday last, the 14th instant, which stands already officially recorded on the Journals of the House as having been resolved in the affirmative.

*June 22, 1880.*

## EARLDOM OF MAR.

### NOTICE OF MOTION.

THE EARL OF GALLOWAY.—I beg to give notice to the noble and learned Lord on the woolsack, that on Thursday, July 1st, I shall move—

That in accordance with the Resolution agreed to by this House on the 14th June :—

“That it is incumbent upon this House to rescind their Order of 26th February 1875, which ran as follows, viz. :—‘That at the future meetings of the Peers of Scotland assembled under any royal proclamation, for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar, according to its place on the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings of such election ;’”

to resolve that the said Order be rescinded, and that intimation to that effect be made to the Lord Clerk Register of Scotland.

*House of Lords, Thursday, 1st July 1880.*

## EARLDOM OF MAR.

### RESOLUTION.

THE EARL OF GALLOWAY rose to move—

“That in accordance with the Resolution agreed to by this House on the 14th June last, ‘That it is incumbent upon this House to rescind their Order of the 26th February 1875, which ran as follows, viz. :—“That at the

future meetings of Peers of Scotland assembled under any royal proclamation, for the election of a Peer or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar according to its place on the Roll of Peers of Scotland, called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings of such election,' this House resolve that the said Order be rescinded, and that intimation to that effect be made to the Lord Clerk Register of Scotland."

The noble Earl said he was in a position in which he was, perhaps, entitled to claim their Lordships' sympathy, and he should ask their indulgence while he attempted to put before them the position in which the House was placed on the subject of his Resolution. Just a month ago, on the 1st of June, he gave notice in that House that he intended to move two Resolutions with regard to the Mar Peerage. He did not wish to disguise the fact that he was very anxious to call the attention of the public to this question; and for the purpose of calling public attention to it, he not only put a notice upon the paper, but in addition—having made the public declaration between five and a quarter past five o'clock in the usual manner—took measures to insure the notice getting into the hands of the reporters. That notice he had given for the 14th of the month, so that there would be ample opportunity for everybody to know that the question was coming on; and two days previous to bringing on the Resolution, he took means to let every member of their Lordships' House know that the subject was to be discussed—a means with which all their Lordships were familiar. Of course, he had no notion whatever as to the opinions of any noble Lord on the subject. He would not weary the House by reciting what the Resolutions were; but the particular one which was the subject of his notice this evening was to the effect that in accordance with the Report of the Select Committee specially appointed to inquire into the matter three years ago—namely, in 1877—it was incumbent on the House to rescind the Order of February 26th, 1875, and that an Order to that effect should be sent to the Lord Clerk Register of Scotland. At this time he had put to the Resolution six words, which he afterwards withdrew, and these were, "and the said Order is hereby rescinded." But, upon reading over his notice, he had said to himself—"Now, it would be rather an affront to their Lordships to add these words; for if their Lordships agreed with me that it is incumbent on them to rescind the Order, they will, as a matter of course, carry that Resolution into effect;" and he need not add that it would have been perfectly easy for him, after the Resolution was carried, to have moved simply that the words he had left out be added. If he had done that he was sure the motion for the addi-

tion would have been carried without a dissentient vote. However, a week passed, and a noble friend of his opposite (the Marquess of Huntly), who had always taken a very deep interest in the question, in his place, asked the noble and learned Lord on the woolsack, what Order he had sent to the Lord Clerk Register in consequence of the Resolution agreed to by the House? He would remind their Lordships that on the 14th ultimo the debate lasted for over two hours. It was a very full debate; and upon going to a division the numbers were—Contents, 49; Not-Contents, 41—which was a majority of 8; but had it not been for the accident of one Peer going into the wrong lobby, the voting would have been 50 to 40, or a very substantial majority, and one which on most questions would be considered very decisive. A week after this vote was taken, a noble friend of his opposite asked the noble and learned Lord on the woolsack what Order he had sent to the Lord Clerk Register, or—

THE LORD CHANCELLOR said, the question was not what Order he had sent to the Lord Clerk Register, for he had no more authority to send an Order from the House than had the noble Earl himself.

THE EARL OF GALLOWAY begged the noble and learned Lord's pardon, but wished to be allowed to finish the sentence. If he might be allowed to quote the noble and learned Lord's reply, it would be found that there was no reason to interrupt him. The noble and learned Lord had replied that the House had given him no authority to rescind any Order; and that the Resolution had only stated that it was incumbent on their Lordships to do a certain thing which they had given him no authority to do. The noble and learned Lord had added some pithy remarks which were not pertinent to his (the Earl of Galloway's) point at the present moment. Upon this he had immediately risen in his place and given notice that, in consequence of that reply, he would bring forward the present Resolution on the first available day. He had been very much astonished to hear that anything further was necessary, as he believed that the matter was decided once and for all, and that there was nothing further for him to do in the matter. He had found out that Thursday, 1st July, was the first available day for bringing the matter on; and, having chosen that day, it had still seemed to him that he had only to move his Resolution as a matter of form, as the House had already decided the matter, and that the question would be put from the woolsack almost like the third reading of a Bill, or rather after the third reading, as the question "That this Bill do pass," which was never challenged. He had thought that there would be as much reason to expect that the rejection of a Bill would be moved on the

motion "That this Bill do pass," as that at this stage his Resolution would be opposed. He had, therefore, been very much astonished the morning after he had given his notice to find in the papers the amendment of the noble Earl the Chairman of Committees. He had taken some pains to find out whether the course adopted by the noble Earl was at all customary; and from all he could learn it seemed that it was altogether without precedent. He had consulted many noble Lords, but there was not one who could point out a precedent; therefore, he would leave it to their Lordships to say whether the noble Earl was acting in accordance with the regulations and usages of the House. Was it open to the noble Earl to discuss his amendment at all? If it was, it seemed to him that they were laying down a most dangerous precedent; and he did not believe that if their Lordships balloted on the question of order, the noble Earl would have ten supporters. For his own part, he (the Earl of Galloway) was not prepared to transgress the rules of the House. He had made his speech on a former occasion, and had carried his Resolution; and he should certainly not break the rules of the House by re-opening the question. Of course, if they permitted the amendment to be put, it would be open to him to reply. If any other noble Lord had put down an amendment to a Resolution, the object of which was simply to render operative a Resolution of the House, he would have been severely castigated, and castigated by none more severely than by the noble Earl the Chairman of Committees (the Earl of Redesdale). He would conclude for the present by moving his Resolution.

*Moved to resolve :—*

"That, in accordance with the Resolution agreed to by this House on the 14th June last, 'That it is incumbent upon this House to rescind their Order of 26th February 1875, which ran as follows, viz., "That at the future meetings of the Peers of Scotland assembled under any royal proclamation for the election of a Peers or Peers to represent the Peerage of Scotland in Parliament, the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar according to its place on the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom, and do permit him to take part in the proceedings of such election,"' the said Order be rescinded, and that intimation to that effect be made to the Lord Clerk Register of Scotland."—(*The Earl of Galloway.*)

THE EARL OF REDESDALE (Chairman of Committees) rose to move, as an amendment, to leave out all the words after "That," for the purpose of inserting the following words :—

"Further consideration has led this House to consider that it would be inexpedient to rescind the Order of the 26th February 1875, which was made after the House had resolved and adjudged that Walter Henry, Earl

of Kellie, Viscount Fenton, Baron Erskine, and Baron Dirleton, in the Peerage of Scotland, had made out his claim to the Earldom of Mar in the Peerage of Scotland created in 1565, as consequential to such Resolution and judgment, and that to rescind an Order so made in relation to a right to a peerage adjudged after long investigation, and which Order has been acted upon at several elections of Scotch Peers, without any further inquiry, and unsupported by any new evidence, would be contrary to the practice of this House, and establish an objectionable and dangerous precedent."

The noble Earl said, that, after what had fallen from the noble Earl, it was necessary that he should explain why he had given notice of his amendment. He believed the question to be one of the deepest importance to the character of that House. They must remember that that House was the highest Court of Judicature in the kingdom, and they must take the greatest care that nothing was done in regard to judicial questions which affected the character of the House, or its power to give judgment on these matters. From the manner in which this question was handled, he thought many noble Lords had been influenced by wrong impressions. For instance, it had been very much the fashion to treat the Committee of Privileges as if it was not the House; whereas, in fact, it was a Committee of the whole House. The House had always treated questions of peerage in that way; and so remarkably careful had it always been to guard against miscarriage, that instead of requiring a quorum of only three, as at the ordinary sittings of the House, it insisted, when in Committee upon Privilege, upon a quorum of seven. These questions of disputed peerages were referred by the Sovereign to the House of Lords, as the highest Court of Judicature in the kingdom, in order to obtain the opinion of that high Court: and when the question was decided by the House, notice was sent to the Queen of the decision come to, and that decision was final, and always acted on. He must ask their Lordships to consider what would be the effect if any peer was, whenever he pleased, to get up and move that a judicial decision of the House be rescinded. The noble Earl now proposed the rescinding of judicial Order; and the facts stated showed that it was necessary for the House to make such Order, as otherwise there would be nothing but confusion in the Scotch Peers' elections. Objection was taken that the name of the Earl of Mar on the Roll of Peers was not placed according to the date at which the House had determined the peerage was granted. There were two ways in which the question as to the date must be considered by those who took this matter up. Nobody could doubt that the date on the Roll was not the proper place of the peerage awarded by the House to Lord Kellie: but it was also not the date of the peerage claimed by Mr. Goodeve Erskine. From

what took place before the Commission of Ranking, it was quite evident that the Lord Mar of that day was very anxious to get the old Earldom conferred on him, and, with that object in view, he adduced before that Commission three important documents. One was the charter of Isabel of 1404, the second was the Act of Parliament of 1585, ratifying the whole right and title made to John Earl of Mar, of the comitatus as heir by progress to Dame Isabel; and the other was an extract of the retours of 20th March 1588, whereby John Earl of Mar was declared her lawful heir. Therefore, the Commission had before them all the particulars of his descent, and all the evidence he could produce of his claim as heir to Isabella; but they refused to give him the date of 1404. On the contrary, the date which they assigned to the Earldom of Mar was 1457, thereby altogether refusing to admit that the charter of Isabel of 1404 had anything to do with the Earldom then before them. There was no evidence whatever, from anything that had taken place in the Parliament of Scotland, or, since the Union, in the House of Lords, of any person being recognised as possessed of the ancient Earldom since the death of the last heir-male in 1377, which had, therefore, been now extinct for 500 years. During the interval, the Crown created several Earls of Mar; and down to the time when Queen Mary made Lord Erskine Earl of Mar on the eve of her marriage, no member of the family of Erskine was Earl of Mar. These and various other circumstances connected with the case being brought before the Committee of Privileges, the Committee came to the decision that Lord Kellie had made out his claim to the Earldom of Mar created by Queen Mary. Those persons who took up the case of the other claimant did not quite accurately state the facts. They seemed to conceive that because he got returned as heir to his uncle he was entitled to his peerage; whereas it did not really show he was heir to the peerage unless he could prove that the peerage went to heirs-general. The Order which the House was now asked to rescind had been in existence for five years, and had been acted on in several Scotch elections. After so long an interval, on account of some personal feeling, noble Lords came before the House, and urged their Lordships to say that it was desirable to rescind that Order. ("No, no!") Well, he asked, why was not the subject brought forward before? For five years the decision of the House had been unchallenged, and now that it was challenged, what was the object of it? He believed it was to prevent Lord Mar having any place to answer from when the Union Roll was called. If the motion were carried, and the Earl of Mar and Kellie answered to the peerage on the Roll, his vote would be objected to. Well, was the Earldom of Mar then to have no place on the Union Roll?

A circular had been sent round to their Lordships, calling on them to maintain the "integrity of the Scotch Peerage," and stating that it was being placed in danger. Who, he asked, was endangering the integrity of the Scotch Peerage? and how was it being endangered? In his opinion, it was an entire misconception to use such terms as those. He desired particularly to impress on their Lordships not to do anything which would in any way affect the judicial character of that House. There was no point on which they required to be more careful than on that. In this country the House of Lords was the Supreme Court of Appeal; and their Lordships should be careful not to allow the impression to go abroad that in a matter of a judicial character the House would be guided without consulting those capable of giving advice. The noble Earl (the Earl of Galloway) seemed to think that any noble Lord was capable of giving advice on a judicial question. To carry his motion would be, in effect, to establish a dangerous precedent. The noble Earl asked the House, without hearing further evidence, and without conference with any one capable of giving a judicial opinion, to rescind a judicial Order of the House. This was contrary to the established practice of the House, and would, if it were agreed to, establish a precedent as dangerous as it was new.

Amendment *moved*—

To leave out all the words after "That" for the purpose of inserting the following words: "further consideration has led this House to consider that it would be inexpedient to rescind the Order of the 26th February 1875, which was made after the House had resolved and adjudged that Walter Henry Earl of Kellie, Viscount Fenton, Baron Erskine, and Baron Dirleton, in the Peerage of Scotland, had made out his claim to the Earldom of Mar in the peerage of Scotland, created in 1565, as consequential to such Resolution and judgment, and that to rescind an Order so made in relation to a right to a peerage adjudged after long investigation, and which Order has been acted upon at several elections of Scotch Peers, without any further inquiry and unsupported by any new evidence, would be contrary to the practice of this House, and establish an objectionable and dangerous precedent."—(*The Earl of Redesdale.*)

THE EARL OF CAMPERDOWN observed that when noble Lords commenced addressing the House on the Mar Peerage they invariably commenced by referring to one Earl, and then drifting on to speak of all the personages mixed up in the vexed question of the Mar Peerage. He ventured to think that the House was not quite in order. The noble Earl opposite (the Earl of Galloway) did not, when he entered into the question and introduced his motion, deal with the merits of the case; but had rather confined himself to the question whether the noble Earl the Chairman of Committees (the Earl of Redesdale) was in order in putting his amendment on the paper. When the noble Earl moved his amendment he went into

the merits of the question, and entirely avoided going into the question of order. The noble Earl (the Earl of Galloway) intended to raise a mere formal point of procedure. If the result of the debate on the 14th of June had been the opposite of what it had been, he (the Earl of Camperdown) had no hesitation in saying that the noble Earl (the Earl of Galloway) would have received a severe and well-deserved castigation from the noble Earl at the table, if he had re-opened the whole question on a formal and technical point, or a point of order. He did not even know if he could discuss the merits of the amendment at the present stage of the debate. The first question for the House to decide was, whether the noble Earl the Chairman of Committees was in order in bringing forward his motion?

LORD BLACKBURN said he believed the motion which the noble Earl (the Earl of Galloway) had placed on the paper would do harm rather than good to the integrity of the Scottish Peerage. The question, "Who was entitled to the ancient Earldom of Mar?" was one which could not be decided except by a tribunal competent to take evidence and decide upon the evidence before it. The question was not who should be the heir, but who should be Earl of Mar. Lord Kellie petitioned the Crown that he should be Earl of Mar. His petition was referred to that House, and every one must have known that the question referred to them was one which could not be determined without evidence. The House, in the ordinary course, referred the petition to a Committee of Privileges, which was the ordinary and constitutional mode of dealing with such a petition. During the seven years that the question was before the Committee an enormous mass of documentary evidence had been collected. He would not now say what the effect of that evidence would be; but it was at least so considerable in bulk that probably no noble Lord had read it through. Judgment had been given by the legal Peers, and the then Lord Chancellor (Earl Cairns) expressed an opinion upon the point raised with great clearness. He (Lord Blackburn) could not now absolutely affirm that the noble Earl (the Earl of Galloway) was wrong; but he could not say he was right. All he could at present venture to say was, that no man who had not read the evidence before the Committee of Privileges was competent to pass an opinion on the subject. The method now adopted was not the one by which the point could be satisfactorily decided. In a court of justice the practice always was to examine a man's title. Mr. Goodeve Erskine said he was the Earl of Mar. It was open to him to petition the Crown; the petition would be sent down to the House, and the House would refer it to a Committee of Privileges. Against that the previous decision would be no bar. Let

him not be misunderstood. When he said it would be no bar, he did not mean to say it would not be an important element. The petitioner had to make out his case in every instance. In this he would not only have to persuade the Committee that he was right, but to make them say that the former decision was wrong. If this question had to be re-tried, let that be done in a proper manner. Let not their Lordships make a rush without evidence, and merely on the authority of antiquaries and persons who knew no law. Those who wanted the House to rescind the Order of the 26th of February 1875 said they did not want to interfere with the judgment of the House. That was very much as if, in relation to the judgment of a court of law, persons said they did not want to interfere with it ; but only wanted to prevent its execution, and to see that the Sheriff did not carry it into effect.

THE MARQUESS OF HUNTLY wished that the noble and learned Lord (Lord Blackburn) had remained a little longer in his place the other evening, and had made himself more acquainted with the facts of the case. What they wanted to do was to put this peerage upon the Roll. That had not yet been done ; consequently, the Order of the House had not been carried out. He reminded the noble Earl at the table (the Earl of Redesdale) that he quite misunderstood the reason why the question was allowed to slumber for five years after the Report of the Select Committee. The course which the affair took was as follows :—The Earl of Kellie came before the Committee of Privileges and asked to be placed on the Union Roll as Earl of Mar, created in 1565 ; but the ancient Earl of Mar did not come as a claimant before this House at all. He merely protested against his peerage being so put on the Roll. The Committee of Privileges went into the question, but they did not decide anything about the old peerage ; all they did was to allow the noble Earl (the Earl of Kellie) to have a peerage of Mar of 1565. The House did not decide anything, either negatively or affirmatively, with regard to the ancient Earldom of Mar. At the last election at Holyrood the Earl of Mar came forward to vote, and some noble Lords protested, and a “ scene ” followed. The noble Earl opposite (the Earl of Galloway) then came down, and moved that the Earldom as it stood should be brought down to the Roll of 1565. The Report of the Select Committee distinctly said that no Order was made with reference to the old Earldom, and distinctly affirmed that the old Earldom was still on the Roll. Let the noble Lord (the Earl of Mar and Kellie) put his Earldom on the Roll, and leave the old Earldom to take care of itself. He objected to the assertion that the Scotch Peers treated this question on personal grounds. The point to be decided was one involving more than personal interests for Scotch Peers—namely, what

was the right place on the Union Roll for the Mar Peerage? The matter could not be left in its present position. He hoped their Lordships would not stultify themselves by insisting on the Resolution which had been carried the other day.

THE DUKE OF ARGYLL said he was unable to understand what was the difficulty raised with regard to the point of order. A few weeks ago the House came to the conclusion that it was incumbent on it to rescind a certain Order; but in order to carry that opinion into effect—as it was not binding—it was necessary that there should be a separate and new motion to rescind. When the motion was placed on the paper the noble Earl (the Earl of Redesdale) gave notice of an amendment. He did not see that the noble Earl could be accused of being out of order in moving an amendment to a new motion brought before the House, consequent on the Resolution of the 14th of June. He did not intend to enter at any length into the merits of the question. Like most other members of the Scotch Peerage, he thought the question one of great importance, apart from all personal considerations. He did not think that those who took the part of Mr. Goodeve Erskine acted from mere personal motives, for he believed that they desired to see the Scotch Peerage Roll made up properly for the honour of the Scotch Peerage. He could, to a certain extent, sympathise with those noble Lords. When the noble Earl the Chairman of Committees (the Earl of Redesdale) spoke of “personal motives,” he did not speak of personal motives in an unworthy sense; but he was bound to say, not having read the evidence before the Committee, that he was unable to give an opinion on a legal question which ought to be decided by a legal tribunal. He did not think it would redound to the honour of the Scotch Peerage to snatch a victory by a chance vote. On the contrary, he thought they should abstain from any hasty expression on so important a subject. For himself, he would be glad if Mr. Goodeve Erskine could secure his Scotch Peerage; but the proper course must be taken to that end. One of the subordinate questions raised was where his name should stand on the Roll at Holyrood. The noble Duke opposite (the Duke of Richmond and Gordon) would know that that was a question which must be gone into with the fullest evidence and material for coming to a conclusion. For one, he (the Duke of Argyll) knew that his name occupied a position on the Roll which he ought not to do, and the same was the case with the noble Duke (the Duke of Sutherland.) Noble Lords knew that those were not solitary instances, and if they were to go into that question, it must be done in judicial form. If Mr. Goodeve Erskine wanted to keep his place, he must issue a new Commission. This question should not be made a political or personal one; and he believed that on the 14th

of June the House was hurried into giving a vote without having before it adequate information on the subject. He felt strongly the plea raised by the noble Earl (the Earl of Redesdale), to be zealous of the honour of the House when dealing with questions of a judicial character.

THE EARL OF MANSFIELD said, that the real reason why this question had been brought forward was, that justice had not been done. He had looked into the decision of the Committee of Privileges, and he contended that it was contrary to justice in every way; and he could show from documents, legal and historical, that there was no proof that the date 1565 was correct for the Earl of Kellie's title of the Earl of Mar. He wished to ask how the Order of the Committee in the House was originally given out? He had heard that no Resolution of the House was come to, and that there was nothing recorded upon the Journals of the House. Although the House had not come to any decision with regard to the ancient Earldom of Mar, Mr. Goodeve Erskine, as the noble Duke who had just sat down called him, but, as he preferred to call him, the Earl of Mar, was placed in the position that he could not present himself at the election of Scotch Peers, and insist on having his claim to vote admitted. If noble Lords would only look into the question and consider it, they would see the injustice of what had been done. He knew of no individual, however, who had not, after examination, adopted his view of the matter. In Edinburgh all the lawyers in Parliament House were of one opinion; and when it was said that the House was acting against the legal authorities, he would remind the House that the decision of the Committee was come to against the opinions of the Attorney-General for England and the Solicitor-General for Scotland. They wished to see the Earl of Mar placed in a position in which he could claim to vote for the Earldom of Mar; and at present he could not do that. In conclusion, he expressed his intention of supporting his noble friend on his right.

THE MARQUESS OF LOTHIAN said, that the passing of the Resolution of the noble Earl (the Earl of Galloway) would only add to the unseemly wrangles and scenes that had taken place, and would only increase the difficulties of the Lord Clerk Register. He pointed out that the proper course for Mr. Goodeve Erskine to pursue, was to tender his vote before the Lord Clerk Register, and raise his claim to the Earldom of Mar; then the proper number of Peers should protest against its being accepted; and then the question would be brought before the House of Lords for consideration. What would be the practical result if the Resolution of the noble Earl (the Earl of Galloway) should be carried? Why, there would be more confusion than at present; and, so far as the

Roll of 1705 and the Union Roll were concerned, they have no legal force at all. They were not authoritative documents to show the precedence of Scotch Peers. As a Resolution, if carried, would not put an end to the difficulties, it could have no good purpose whatever. It could not prevent the Earl of Kellie answering as Earl of Mar when the title was called over. Therefore he would again suggest that Mr. Goodeve Erskine should present himself at Holyrood; that a protest should be made to the reception of his vote, and that the rights and the wrongs of his case should be brought for decision before the House of Lords; and he would be glad if he could prove his claim to the title.

THE LORD CHANCELLOR said, he might claim to speak impartially on this subject. In the first place, he was not a Scotch Peer, neither was he one of the Lords who took part in the hearing or the judgment of Lord Kellie's case. He was, in fact, disabled from doing so by the circumstance of his having been counsel for Mr. Goodeve Erskine, as an opponent to Lord Kellie's claim. He had felt much interest in Mr. Erskine's claim, and wished very heartily for his success; and as far as his opinion when counsel went—which was not for a moment to be put in competition with that of the judicial tribunal—he had not formed an unfavourable opinion of Mr. Erskine's claim. He contended, therefore, that he was now able to offer impartial advice; and occupying the position he did, he felt it his duty to offer that advice, for it appeared to him that their Lordships had inadvertently become entangled in a dangerous position, which, if they did not extricate themselves from it, might be in a high degree detrimental to the character of their Lordships in one of their functions as to which it was essential they should be beyond censure or suspicion: he meant their judicial capacity. He could not agree with the noble Earl (the Earl of Galloway) that the motion he had now made could have been regarded as a matter of form, even if no opposition had been offered; because he himself ventured, on a former occasion, to which reference had been made, to point out that it would be impossible for the House simply to rescind the Resolution of the 26th February 1875, without substituting something else for it. He had hoped that that intimation of his opinion would not be lost on the noble Earl if he came forward to make a motion; but it was clear to him that the noble Earl was embarrassed by his own success, and that he did not know what other Order to substitute for that which he proposed to rescind. The noble Earl talked of the amendment as being unprecedented; but anything more unprecedented or dangerous than, on a motion like this, after a general debate to rescind a judicial Order, without venturing to say what other more proper Order should be substituted for it,

could not be imagined. If the noble Earl had ventured to propose some other Order, there would have been only a choice of two courses open to him. If he had proposed to change the place of the title of Mar which now stands upon the Union Roll, by moving it to a lower position on that Roll, he would have prejudiced any future claim by Mr. Goodeve Erskine, who might hereafter come forward to show that there were two Earldoms of Mar, and that the Earldom now on the Roll was in a position, not lower, at all events, than that in which the more ancient Earldom, claimed by him, ought to be. This was the very thing which the Earl of Mar and Kellie, by his petition in 1877, had asked the House to do, and which the Committee, then appointed to consider that petition, for that very reason advised the House not to do. If, on the contrary, he had taken the other alternative, he would, in the name of the House, without any new evidence whatever, and without any judicial grounds before the House, have prejudged the matter in the teeth of the decision arrived at in 1875, by placing on the Union Roll two Earldoms of Mar; for whatever else was doubtful, this was certain—that Lord Cairns (then Lord Chancellor), Lord Chelmsford (a former Chancellor), and the noble Earl, the Chairman of Committees, grounded their decision on reasons absolutely inconsistent with the hypothesis of their being, at the date of the Decree of Ranking, two Earldoms of Mar. If they had not believed that the evidence then before them proved the extinction, and failed to prove the restoration, of the ancient Earldom of Mar, it would have been impossible for them to hold that a Mar Peerage was created in 1565. He did not say whether they were right or not. He (the Lord Chancellor) adhered to what he had said on a former occasion—namely that, as far as the judgment of the House was concerned, it had decided only that the Earl of Kellie was entitled to a peerage created in 1565; and that, if any one else could now prove his right to a peerage of Mar of earlier date, it was open to him to come forward and claim it. Noble Lords who took an interest in this question, and more especially the noble Earl who spoke last but one (the Earl of Mansfield), asked them in a debate of that sort to proceed on the ground that injustice was done by their former decision. Their Lordships were asked extrajudicially, when probably not half-a-dozen of them had even attempted to read or consider the evidence, to decide against the deliberate judgment of Lord Cairns and the other two learned Lords, and to reverse a judicial decision of that House, on the ground that it was unjust. If anything in the world required to be done judicially, it would be such a reversal of a former Order, and the reasons avowed for such reversal formed the most cogent argument

against the course proposed by the noble Earl. Noble Lords, who thought themselves qualified to sit in judgment on the decisions of that House, did not appear to have taken the trouble to inform themselves accurately on some even of the simplest elements of the case. The noble Earl (the Earl of Galloway) had said he thought his motion followed naturally from the Report of the Committee of 1877; but he (the Lord Chancellor) was astonished at that assertion. The Select Committee of 1877 were asked by Lord Kellie to put the title of Mar lower down on the Roll, and the Select Committee thought that the object of the request was, apparently, to prejudice the claim of Mr. Goodeve Erskine. They said in effect—"If Mr. Erskine asserts his right to be Earl of Mar, let him claim to vote; let there be protests against his claim, and then the matter must come to this House to be determined." It was, therefore, adjudged that nothing should be done on Lord Kellie's petition; but the noble Earl (the Earl of Galloway) seemed to think the logical consequence of that decision was that the contrary course should be taken. The whole of the noble Earl's motion was founded on the argument that it was impossible that the peerage created in 1565 could be in the place on the Union Roll in which the peerage of Mar was now found. That would be a very good argument if it were certain that all the peerages were put on the Roll in their proper order; but the peerage of Mar was in a position on the Roll wholly inexplicable by any theory of that peerage. The original peerage was much older than 1404. It was dealt with in 1404 in a somewhat extraordinary manner by the Countess Isabel, the last of the ancient line who ever held the title before 1565; and the evidences produced before King James the First's Commission of Ranking, on whose Decreet the Union Roll was founded, carried it back to 1404, and not earlier. But it was placed, by the Decreet of Ranking, and upon the Union Roll, next below the Earldom of Erroll, which was not created till above half a century after 1404. If the Union Roll ought to be corrected, and if that could not be done by an application to the Court of Session, it ought to be done in a manner quite different from that proposed by the noble Earl. The Queen was the fountain of honour; and if there were errors in the Decreet of Ranking, which was made in 1606 under Royal authority, let there be a petition presented to the Crown to have those errors corrected, and possibly the Crown might be advised to issue a Commission of Review, or might, if it were thought fit, refer any particular question of precedence for the determination of this House. If, under such a reference or otherwise, the House should ever have any duty to discharge in the matter, it must proceed in a more judicial manner than that recommended by the noble Earl.

THE EARL OF GALLOWAY, who rose amid cries of "Divide!" reminded their Lordships that he had reserved his remarks on the merits of the case, and that, therefore, he was entitled to be heard. The judgment of the Committee to which the Lord Chancellor and another noble and learned Lord, who had quoted the words of the noble and learned Earl (Earl Cairns) upon the occasion, referred was given five years ago, and he believed that opinions on that subject had altered very much since then. He would like to recall what the noble and learned Earl (Earl Cairns) said in the debate last year, namely—

"That the peerage on the Roll which is called the Mar Peerage, is not the peerage which has been attached in this House to the Earl of Mar and Kellie; and, therefore, the Earl of Mar and Kellie should not be allowed to answer that call."—[3 *Hansard*, cclxviii. 137.]

He considered that that confirmed his argument, that the Order was not consequential upon the judgment of the Committee of Privileges, as suggested in the amendment of the Chairman of Committees.

THE LORD CHANCELLOR observed, that when the noble Earl quoted that same passage from the noble and learned Earl's (Earl Cairns') speech on the 14th of June, the noble and learned Earl himself, after hearing the quotation, told him (the Lord Chancellor) that his words must have been incorrectly reported.

THE EARL OF GALLOWAY replied, that although the noble and learned Earl (Earl Cairns) was sitting below him when he read the quotation, he did not offer to challenge its accuracy. It was rather late in the day for them to be told now, in the noble and learned Earl's absence, that the report was not correct. Replying to some of the noble Earl's (the Earl of Redesdale's) criticisms, the noble Earl observed that Her Majesty the Queen had now been upon the throne over forty years. Supposing Her Majesty, having created a peerage in the year 1840, had now appointed Ranking Commissioners to see that each peer was put according to his proper precedence upon the Roll of Peers; and supposing that a peer created by Her Majesty in 1840 came before those Commissioners in 1880, and claimed to be put on the Roll for the year 1730—would he have a chance of succeeding in such a claim? ("No!") Well, this was exactly a similar case. It was exactly forty years after 1565—namely, in 1605—that the Mar Peerage of 1565 was put upon the Decree of Ranking. It was upon the authoritative documents he produced that he was put upon the Union Roll. ("Divide!") He knew their Lordships were weary of this discussion; but he must say a word in reply to what fell from the noble and learned Lord on the woolsack. It was not for him (the Earl of Galloway) to say what new Order should be substi-

tuted for the Order he proposed to rescind. All that he said was that the latter was at variance with the judgment of the Committee of Privileges; and he simply asked their Lordships to support and give effect to the Report of the Committee of Privileges. It had been said that it was open to the owner of the title of the ancient Earldom to go to Holyrood to vote, and thus have the validity of his vote tested. Well, the holder of this ancient Earldom did go to Holyrood; but what happened? The Lord Clerk Register declined to accept his vote, or to allow him to take part in the proceedings, threw his voting list on the floor, and told him he was a peer of his own creation. Therefore, this course which he now proposed was the only possible way of getting over the difficulty, and paving the way for a decision. If they removed the barrier offered by that Resolution, then they would give the claimant of the title the opportunity of doing that which noble Lords said he could do already, but which he had shown himself to have been a witness of his not having been allowed to do. He hoped their Lordships would not be carried away entirely by the opinions of noble and learned Lords. He asked them, remembering what had been the practical result hitherto, to support his Resolution, in order that an end might be put to this continual confusion.

THE DUKE OF RICHMOND AND GORDON wished to confirm the statement of the noble and learned Lord, the Lord Chancellor, that his noble and learned friend (Earl Cairns) denied the accuracy of that part of the report of his speech in *Hansard* which the noble Earl (the Earl of Galloway) had quoted. In proof of that, he would quote another passage inconsistent with it, namely—

“Now, the Roll of Peers of Scotland is a public document, and in that Roll there is only one entry of the Earl of Mar. It may be in its right or wrong place—I cannot say anything about that—it is there, and it is to that that this Resolution must have necessarily referred.”—[*Ibid.* 138.]

For himself, he thought their Lordships on the present occasion would do well to follow the advice given on that question by the late Lord Chancellor, by the present Lord Chancellor, and also by the noble Earl the Chairman of Committees.

On Question, That the words proposed to be left out stand part of the motion? Their Lordships divided:—Contents, 52; Not-Contents, 80: Majority, 28.

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Mostyn, L.	Vernon, L.
Norton, L.	Walsingham, L.
O'Neill, L.	Watson, L.
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Saltersford, L. ( <i>E. Courtown.</i> )	Wrottesley, L.
Saltoun, L.	

*Resolved in the Negative.*

## No. VII.

## RETURN

(Pursuant to an Order of the HOUSE OF LORDS, dated 2d August 1880),

FOR A VERBATIM COPY of all PROTESTS presented at HOLYROOD subsequent to the year 1865 up to this time, at each ELECTION of a REPRESENTATIVE PEER or PEERS OF SCOTLAND, in reference to the MAR or any other (if any) PEERAGE OF SCOTLAND.

[The Protests not relating to the Earldom of Mar are left out, and those of the Earl of Crawford are not given at length, as being printed in Letter I.]

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I.—PROTEST PRESENTED AT ELECTION, 21st March 1867.

I, the Right Honourable Walter Coningsby Erskine, Earl of Kellie, Viscount Fenton, Baron Erskine and Dirleton, etc., being advised that I am in right of the title, honours, and dignity of Mar, do hereby protest against John Francis Erskine Goodeve, designing himself the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, etc., or any other person being permitted to appear, answer, act, or vote, personally or by signed list, or otherwise, as Earl of Mar and Baron Garioch, or being permitted to use any of the titles, honours, or dignities of Mar or Garioch, until he shall have established his right thereto; but in the meantime I waive my right to answer and vote as Earl Mar.

In testimony whereof, I have subscribed this Protest at Holyrood, the twenty-first day of March one thousand eight hundred and sixty-seven, in presence of the Peers assembled.

KELLIE.

## II.—PROTESTS PRESENTED AT ELECTION, *27th November 1867.*

I, the Right Honourable Walter Coningsby Erskine, Earl of Kellie, Viscount Fenton, Baron Erskine and Dirleton, etc., being advised that I am in right of the title, honours, and dignity of Mar, and having presented a petition to Her Majesty, claiming said title, honours, and dignity, which petition has been remitted to the House of Lords, but has not yet been disposed of by their Lordships' House, do hereby protest against John Francis Erskine Goodeve, designing himself the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, etc., being permitted to appear, answer, act, or vote, personally or by signed list, or otherwise, as Earl of Mar and Baron Garioch, or being permitted to use any of the titles, honours, or dignities of Mar or Garioch, until he shall have duly established his right thereto; but in the meantime I waive my right to answer and vote as Earl of Mar.

In testimony whereof, I have subscribed this Protest at Holyrood, the twenty-seventh day of November one thousand eight hundred and sixty-seven, in presence of the Peers assembled.

KELLIE.

PROTEST *for the* RIGHT HONOURABLE JOHN FRANCIS ERSKINE  
GOODEVE ERSKINE, EARL OF MAR, BARON GARIOCH, ETC.  
ETC.

Mr. Blair, advocate, as procurator for the said John Francis Erskine Goodeve Erskine, Earl of Mar, etc., in answer to the protest by the Right Honourable Walter Earl of Kellie against the compeerer's right to the title of Earl of Mar, stated that answers to Lord Kellie's petition to have the title of Earl of Mar adjudicated to him are now in course of preparation, and will in due time be lodged in the House of Lords. Mr. Blair therefore, on the part of the said John Francis Erskine Goodeve Erskine, Earl of Mar, protested against any assumption by Lord Kellie of that title, and further protested that the compeerer's non-appearance to vote at this election shall in no ways prejudice his right to the said Earldom of Mar. And thereupon asked and took instruments in the hands of the clerk.

ALEXR. BLAIR.

HOLYROOD HOUSE, *27th November 1867.*

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## III.—PROTESTS PRESENTED AT ELECTION, *3d December 1868.*

I, John Francis Erskine Goodeve Erskine, Earl of Mar and Baron Garioch, protest against the calling at the election of Representative Peers for Scotland on the third day of December

next of any other Earl on the Roll before me, in respect I am the direct heir of line and of blood of John Erskine, Earl of Mar, Regent of Scotland, who was heir of line of the Lady Elyne or Helen de Mar, daughter of Graitney Earl of Mar, and who was also heir of the Lady Isabel Douglas, Countess of Mar in her own right, and thus heir of line and of blood of the ancient Earls of Mar, which said John Earl of Mar obtained a charter of the said Earldom of Mar to him and his heirs and assigns from Mary Queen of Scotland on or about the twenty-third of June fifteen hundred and sixty-five, "as heir of Bluid to umquhile Dame Isabella Douglas, Countess of Mar," and which said charter was ratified by an Act of the Scottish Parliament of the nineteenth April fifteen hundred and sixty-seven, and was thereafter confirmed by a subsequent Act of the twenty-ninth July fifteen hundred and eighty-seven, wherein, *inter alia*, it is enacted and declared that John, the heir and son of the Regent, "shall be possessed of every right in the person of Dame Isabel Douglas or umquhile Robert Erll of Mar, Lord Erskine, her heir, notwithstanding the lenth and diuturnitie of tyme quhilk hes intervenit sensyne during the quhilk space he and his predecessouris be the iniquitie of the time hes been wranguslie debarrit." I therefore desire and require that the clerks of the present meeting of Scotch Peers receive this my Protest for precedency, and record the same in their minutes thereof.

Witness my hand and seal this thirtieth day of November  
eighteen hundred and sixty-eight.

MAR. (L.S.)

To the Lord Clerk Register or his deputes and  
the Scotch Peers assembled at Holyrood  
House for the election of representative  
Peers for Scotland, on the third day of  
December eighteen hundred and sixty-  
eight.

I, the Right Honourable Walter Coningsby Erskine, Earl of Kellie, Viscount Fenton, Baron Erskine and Dirleton, etc., being advised that I am in right of the title, honours, and dignity of Mar, and having presented a petition to Her Majesty claiming said title, honours, and dignity, which petition has been remitted to the House of Lords, and is under consideration of their Lordships, do hereby protest against John Francis Erskine Goodeve, designing himself the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, being permitted to appear, answer, act, or vote, personally or by signed list, or otherwise, as Earl of Mar and Baron Garioch, or being permitted to use

any of the titles, honours, or dignities of Mar or Garioch, until he shall have duly established his right thereto; but in the meantime I waive my right to answer and vote as Earl of Mar.

In testimony whereof, I have subscribed this Protest at Holyrood, the third day of December one thousand eight hundred and sixty-eight, in presence of the Peers assembled.

KELLIE.

#### IV.—PROTEST PRESENTED AT ELECTION, 7th July 1869.

I, John Francis Erskine Goodeve Erskine, Earl of Mar and Baron Garioch, protest against the calling at the election of Representative Peers for Scotland on the seventh day of July current of any other Earl on the Roll before me, in respect I am the direct heir of line and of blood of John Erskine, Earl of Mar, Regent of Scotland, who was heir of line of the Lady Elyne or Helen de Mar, daughter of Graitney Earl of Mar, and who was also heir of the Lady Isabel Douglas, Countess of Mar in her own right, and thus heir of line and of blood of the ancient Earls of Mar, which said John Earl of Mar obtained a charter of the said Earldom of Mar to him and his heirs and assigns from Mary Queen of Scotland on or about the twenty-third day of June fifteen hundred and sixty-five, “as heir of Bluid to Dame Isabella Douglas, Countess of Mar,” and which said charter was ratified by an Act of the Scottish Parliament of the nineteenth April fifteen hundred and sixty-seven, and was thereafter confirmed by a subsequent Act of the twenty-ninth July fifteen hundred and eighty-seven, wherein, *inter alia*, it is enacted and declared that John, the heir and son of the Regent, “shall be possessed of every right in the person of Dame Isabel Douglas or umquhile Robert Erll of Mar, Lord Erskine, her heir, notwithstanding the lenth and diuturnite of tyme quhilk hes intervenit sensyne, during the quhilk space he and his predecessouris be the iniquitie of the time has been wranguslie debarrit.” I therefore desire and require that the clerks of the present meeting of Scotch Peers receive this my Protest for precedency, and record the same in their minutes thereof.

Witness my hand and seal this fifth day of July eighteen hundred and sixty-nine.

MAR. (L.S.)

To the Lord Clerk Register or his deputes and the Scotch Peers assembled at Holyrood House for the election of Representative Peers for Scotland on the seventh July eighteen hundred and sixty-nine.

V.—PROTESTS PRESENTED AT ELECTION, *4th August 1870.*

I, John Francis Erskine Goodeve Erskine, Earl of Mar and Baron Garioch, protest against the calling at the election of a Representative Peer for Scotland, on the fourth day of August next, of any other Earl on the Roll before me, in respect I am the direct heir of line and of blood of John Erskine, Earl of Mar, Regent of Scotland, who was heir of line of the Lady Elyne or Helen de Mar, daughter of Graitney Earl of Mar, and who was also heir of the Lady Isabel Douglas, Countess of Mar in her own right, and thus heir of line and of blood of the ancient Earls of Mar, which said John Earl of Mar obtained a charter of the said Earldom of Mar to him and his heirs and assigns from Mary Queen of Scotland, on or about the twenty-third of June fifteen hundred and sixty-five, as heir of blood to umquhile Dame Isabella Douglas, Countess of Mar, and which said charter was ratified by an Act of the Scottish Parliament of the nineteenth April fifteen hundred and sixty-seven, and was thereafter confirmed by a subsequent Act of the twenty-ninth July fifteen hundred and eighty-seven, wherein, *inter alia*, it is enacted and declared that John, the heir and son of the Regent, shall be possessed of every right in the person of Dame Isabel Douglas, or “umquhile Robert Erll of Mar, Lord Erskine, her heir,” “notwithstanding the lenth and diuturnitie of tyme quhilk hes intervenit sensyne during the quhilk space” he “and his predecessouris by the iniquitie of the time has been wranguslie debarrit.” I therefore desire and require that the clerks of the present meeting of Scotch Peers receive this my Protest for precedency, and record the same in their minutes thereof.

Witness my hand and seal this thirtieth day of July in the  
year eighteen hundred and seventy.

MAR. (L.S.)

. . . . .

I, the Right Honourable Walter Coningsby Erskine, Earl of Kellie, having laid claim to the title, honour, and dignity of the Earldom of Mar, and my claim having been remitted by Her Majesty to the House of Lords, and is now under consideration of their Lordships, do hereby protest against John Francis Erskine Goodeve designing himself the Right Honourable Earl of Mar, or being permitted to appear, answer, act, or vote, personally or by signed list, or otherwise, as Earl of Mar, until he shall have duly established his right thereto.

KELLIE.

HOLYROOD, *4th August 1870.*

## VI.—PROTESTS PRESENTED AT ELECTION, 7th March 1872.

I, John Francis Erskine Goodeve Erskine, Earl of Mar and Baron Garioch, protest against the calling at the election of a Representative Peer for Scotland on the 7th day of March present of any other Earl on the Roll before me, in respect I am the direct heir of line and of blood of John Erskine, Earl of Mar, Regent of Scotland, who was heir of line of the Lady Elyne or Helen de Mar, daughter of Graitney Earl of Mar, and who was also heir of the Lady Isabel Douglas, Countess of Mar in her own right, and thus heir of line and of blood of the ancient Earls of Mar, which said John Earl of Mar obtained a charter of the said Earldom of Mar to him and his heirs and assigns from Mary Queen of Scotland on or about the 23d of June 1565, as heir of blood to umquhile Dame Isabella Douglas, Countess of Mar, and which said charter was ratified by an Act of the Scottish Parliament of the 19th April 1567, and was thereafter confirmed by a subsequent Act of the 29th July 1587, wherein, *inter alia*, it is enacted and declared that John, the heir and son of the Regent, shall be possessed of every right in the person of Dame Isabel Douglas or umquhile Robert Erll of Mar, Lord Erskyne, her heir, “notwithstanding the lenth of tyme and diurnitie quhilk hes intervenit sensyne during the quhilk space” he “and his predicessouris by the iniquitie of the time has been wrangously debarrit.” I therefore desire and require that the clerks of the present meeting of Scotch Peers receive this my Protest for precedency, and record the same in their minutes thereof.

Witness my hand and seal this 4th day of March in the year 1872.

(L.S.) MAR.

HILSTON PARK, MONMOUTH, *March 4, 1872.*

. . . . .

I, the Right Honourable Walter Henry Erskine, Earl of Kellie, Viscount Fenton, Baron Erskine and Dirleton, etc. Whereas my father, the Right Honourable Walter Coningsby Erskine, Earl of Kellie, Viscount Fenton, Baron Erskine and Dirleton, etc., now deceased, was advised that he was in right of the title, honours, and dignity of Mar, and presented a petition to Her Majesty claiming said title, honours, and dignity, which petition was remitted to the House of Lords, and is now under consideration of their Lordships. And whereas I, being my said father's eldest son, now stand by his decease in his room and place, and am advised that I am in like manner now in right of the title, honours, and dignity of Mar, and am entitled to follow out the said proceed-

ings instituted by my said father, which it is my intention to do, do hereby protest against John Francis Erskine Goodeve, designing himself the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, being permitted to appear, answer, act, or vote, personally or by signed list, or otherwise, as Earl of Mar and Baron Garioch, or being permitted to use any of the titles, honours, or dignities of Mar or Garioch, until he shall have duly established his right thereto; but in the meantime I waive my right to answer and vote as Earl of Mar.

In testimony whereof, I have subscribed and sealed with my seal this Protest at Alloa Park, in the county of Clackmannan, this fifth day of March one thousand eight hundred and seventy-two, in presence of these witnesses, James Moir, junior, writer, Alloa, and William Pauling, his apprentice.

KELLIE. (L.S.)

JAMES MOIR, Jr., witness.

WILLIAM PAULING, witness.

## VII.—PROTESTS PRESENTED AT ELECTION, 18th February 1874.

I, John Francis Erskine Goodeve Erskine, Earl of Mar and Baron Garioch, protest against the calling at the election of Representative Peers for Scotland on the 18th day of February present, of any other Earl on the Roll before me, in respect I am the direct heir of line and of blood of John Erskine, Earl of Mar, Regent of Scotland, who was heir of line of the Lady Elyne or Helen de Mar, daughter of Graitney Earl of Mar, and who was also heir of the Lady Isabel Douglas, Countess of Mar in her own right, and thus heir of line and of blood of the ancient Earls of Mar, which said John Earl of Mar obtained a charter of the said Earldom of Mar to him and his heirs and assignees from Mary Queen of Scotland on or about the 23d of June 1565, as heir of blood to umquhile Dame Isabella Douglas, Countess of Mar, and which said charter was ratified by an Act of the Scottish Parliament of the 19th April 1567, and was thereafter confirmed by a subsequent Act of the 22d July 1587, wherein, *inter alia*, it is enacted and declared that John, the heir and son of the Regent, shall be possessed of every right in the person of Dame Isabel Douglas, or umquhile Robert Earl of Mar, Lord Erskine, her heir, “notwithstanding the length of tyme and diuturnitie quhilk has intervenit sensyne during the quhilk space” he “and his predicesours by the iniquitie of the time has been wrangously debarrit.” I therefore desire and require that the clerks of the present meet-

ing of Scotch Peers receive this my Protest for precedency, and record the same in their minute thereof.

Witness my hand and seal this 13th day of February in the year 1874.

MAR. (L.S.)

5 ADELAIDE CRESCENT, BRIGHTON,  
*February 13th, 1874.*

I, the Right Honourable Walter Henry Erskine, Earl of Kellie, Viscount Fentoun, Baron Erskine and Dirleton, etc., being advised that I am in right of the title, honours, and dignity of Mar, and having presented a petition to Her Majesty claiming the said title, honours, and dignity, which petition has been remitted to the House of Lords, but has not yet been disposed of by their Lordships' House, do hereby protest against John Francis Erskine Goodeve, designing himself John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, etc., being permitted to appear, answer, act, or vote, personally or by signed list, or otherwise, as Earl of Mar and Baron Garioch, or being permitted to use any of the titles, honours, or dignities of Mar or Garioch, until he shall have duly established his right thereto; but in the meantime I waive my right to answer and vote as Earl of Mar.

In testimony whereof, I have subscribed this Protest at Holyrood, the eighteenth day of February one thousand eight hundred and seventy-four, in presence of the Peers assembled.

KELLIE.

. . . . .

#### VIII.—PROTESTS PRESENTED AT ELECTION, 22d December 1876.

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers of Scotland.*

MY LORD,—I, the Right Honourable Sholto John Watson Douglas, Earl of Morton, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar, which stands on the Union Roll of Peers, and voting before me, as he has no right to the said title of Mar on the Union Roll, but only to a title of Mar recently found by the House of Lords to have been created in fifteen hundred and sixty-five, which creation gives his title of Mar rank below me.

In witness whereof, these presents, written by Walter Scott, clerk to Messrs. Dalgleish and Bell, Writers to

the Signet, are subscribed and sealed by me, at Conaglen, Ardgour, the sixth day of December eighteen hundred and seventy-six, before these witnesses, Joseph Dinning, my butler, and Alfred Cotgreave, my footman.

MORTON. (L.S.)

JOSEPH DINNING, witness.  
ALFRED COTGREAVE, witness.

[FIRST PROTEST OF EARL OF CRAWFORD FOLLOWS.—  
See Vol. I. p. 14.]

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers of Scotland.*

MY LORD,—I, the Right Honourable Charles Gordon, Marquis of Huntly, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar, which stands on the Union Roll of Peers, as he has no right thereto, but only to a title of Earl of Mar, recently found by the House of Lords to have been created in 1565; and if the said Walter Henry Erskine, Earl of Mar and Kellie, should, notwithstanding of the objection hereby made on my behalf, insist on answering to the said title of Earl of Mar so standing on the said Union Roll as aforesaid, I do hereby protest against his so doing, and for remeid of law at a fit and proper time.

In witness whereof, I have signed and sealed these presents, the eleventh day of November eighteen hundred and seventy-six.

HUNTLY. (L.S.)

CHARLES BIDWELL EDWARDES, witness, Estate Agent,  
Minster Precincts, Peterborough.  
HARVEY HALL, witness, Advocate, Aberdeen.

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers of Scotland.*

MY LORD,—I, the Right Honourable Archibald Kennedy, Earl of Cassillis, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar, which stands on the Union Roll of Peers, and voting before me, as he has no right to the said title of Mar on the Union Roll, but only to a title of Mar, recently found by the House of

Lords to have been created in 1565, which creation gives his title of Mar rank below me.

In witness whereof, I have subscribed these presents, written on this page by Robert Stewart, clerk to Lockhart Thomson, solicitor Supreme Courts of Scotland, Edinburgh, at Culzean Castle, the ninth day of November eighteen hundred and seventy-six years, before these witnesses, Robert Shaw, my butler, and George Miles, butler to Lord David Kennedy, of Number 93 Queensgate, Kensington, London.

(L.S.) CASSILLIS.

ROBERT SHAW, witness.

GEORGE MILES, witness.

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers of Scotland.*

MY LORD,—I, the Right Honourable James Sinclair, Earl of Caithness, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar, which stands on the Union Roll of Peers, and voting before me, as he has no right to the said title of Mar on the Union Roll, but only to a title of Earl of Mar recently found by the House of Lords to have been created in 1565, which creation gives his title of Earl of Mar rank below me; and if the said Earl of Mar and Kellie should, notwithstanding of the objection hereby made on my behalf, insist on answering to the said title of Earl of Mar so standing on the said Union Roll as aforesaid, I do hereby protest against his so doing, and for remeid of law at a fit and proper time.

In witness whereof, I have signed and sealed these presents, the 26th day of October eighteen hundred and seventy-six.

(L.S.) CAITHNESS.

POMAR, Stagenhoe Park, Hertfordshire, witness.

ALEX. SINCLAIR, 133 Geo. St., Edinr., witness.

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the election of Representative Peers of Scotland.*

MY LORD,—I, the Right Honourable Francis Lord Napier, do hereby object to the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the title of Earl of Mar on the

Union Roll, which stands on the said Roll with a precedence of more than a century earlier than the title of Mar affirmed by the House of Lords to have been created in 1565, and adjudicated to the Earl of Kellie on February 25th, 1875 ; and should the vote of the Right Honourable John Francis Erskine, Earl of Mar, hitherto received at the elections as that of the representative of the ancient Earldom of Mar on the Union Roll, be tendered, but be not received, I further object to the rejection of the said vote. I ground this Protest on the reasons set forth by the Right Honourable the Earl of Craufurd in his Protest put in on the present occasion under date of December 8th, 1876.

In witness whereof, I have signed and sealed these presents,  
the (22d day) twenty-second day of December eighteen  
hundred and seventy-six.

(L.S.) NAPIER.

JAMES KEIR, Advocate, of 10 Albyn Place,  
Edinburgh, witness.

LOCKHART THOMSON, of No. 114 George Street,  
Edinburgh, witness.

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IX.—PROTESTS PRESENTED AT ELECTION, 11th March 1879.

[ADDITIONAL PROTEST OF EARL OF CRAWFORD.—  
See Vol. I. p. 21.]

I, John Hamilton Dalrymple, Earl of Stair, do hereby give my formal adherence to the above protest of the Right Honourable the Earl of Crawford and Balcarres.

In witness whereof, I have signed these presents, this eighth day of March 1879.

STAIR,  
*Oxenfoord Castle.*

MICHAEL WALTER HENEAGE, Lt.-Col., witness.

HEW H. DALRYMPLE, of North Berwick, Baronet, witness.

I, Charles Gordon, Marquis of Huntly, Earl of Enzie and Aboyne, Viscount Strathavon, Lord of Gordon, etc., do hereby protest against the vote of the Earl of Kellie being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, created in 1565, and resolved to belong to the Earl of Kellie, is not the Earldom on the Roll of Scotch Peers.

In witness whereof, I have subscribed these presents, at  
Oundle, Northamptonshire, the fifth day of March  
eighteen hundred and seventy-nine years before these

witnesses, Granville Armyne Gordon, gentleman, residing at Orton Hall, near Peterborough, and William Gibson, butler to me, the said Marquis of Huntly.

HUNTLY. (L.S.)

GRANVILLE ARMYNE GORDON, witness.

WILLIAM GIBSON, witness.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of a Representative Peer of Scotland.*

I, the Right Honourable Alan Plantagenet Stewart, Earl of Galloway, do hereby object to the Right Hon. Walter Henry Erskine, Earl of Kellie, answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, alleged to have been created in 1565, and resolved to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and further, seeing that the Rt. Hon. John Francis Erskine, Earl of Mar and Baron Garioch, is the undisputed heir-general and next-of-kin of his uncle, the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, and that the said John Francis Erskine, Earl of Mar, having legally qualified himself as successor to his said uncle in that dignity according to the forms competent to the Peers of Scotland, is thus in exactly the same position as every other Scotch Peer; and further, seeing that his position has been in no way affected by the decision in 1875, which conceded to the Earl of Kellie a Mar dignity by an alleged new creation in 1565, it follows that the said John Francis Erskine is now *de jure* and *de facto* by the laws of Scotland reserved inviolate by the Treaty of Union the actual tenant of the ancient and only Earldom of Mar on the Peerage Roll of Scotland; and I hereby protest against his vote as Earl of Mar (should it be tendered) being rejected, and against his being at any time and in any way denied the rights and dignities he inherits as representative and holder of the said ancient and only Earldom of Mar on the Union Roll of Scotch Peers.

In witness whereof, I have signed these presents, the eighth day of March 1879.

GALLOWAY,

17 Upper Grosvenor Street, London.

JAMES MILMON, witness, House Steward.

WILLIAM HARVEY, witness, Footman.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers of Scotland.*

I, William David Viscount Stormont, Baron Scone, and Baron Balvaird, do hereby object to the Right Hon. Walter Henry Erskine, Earl of Kellie, answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, alleged to have been created in 1565, and resolved to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and further, seeing that the Rt. Hon. John Francis Erskine, Earl of Mar and Baron Garioch, is the undisputed heir-general and next-of-kin of his uncle, the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, and that the said John Francis Erskine, Earl of Mar, having legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, is thus in exactly the same position as every other Scotch Peer; and further, seeing that his position has been in no way affected by the decision in 1875, which conceded to the Earl of Kellie a Mar dignity by an alleged new creation in 1565, it follows that the said John Francis Erskine is now *de jure* and *de facto* by the laws of Scotland reserved inviolate by the Treaty of Union the actual tenant of the ancient and only Earldom of Mar on the Peerage Roll of Scotland; and I hereby protest against his vote as Earl of Mar (should it be tendered) being rejected, and against his being at any time and in any way denied the rights and dignities he inherits as representative and holder of the said ancient and only Earldom of Mar on the Union Roll of Scotch Peers.

In witness whereof, I have signed these presents, the tenth of March 1879.

STORMONT,  
*Scone Palace, Perth.*

J. MORGAN, witness.  
W. COLAN, witness.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of a Representative Peer of Scotland.*

I, John Viscount Arbuthnott and Baron Inverbervie, do hereby object to the Right Hon. Walter Henry Erskine, Earl of Kellie, answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar,

inasmuch as the Earldom of Mar alleged to have been created in 1565, and resolved to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and further, seeing that the Right Hon. John Francis Erskine, Earl of Mar and Baron Garioch, is the undisputed heir-general and next-of-kin of his uncle, the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, and that the said John Francis Erskine, Earl of Mar, having legally qualified himself as a successor to his said uncle in that dignity according to the forms competent to the Peers of Scotland, is thus in exactly the same position as every other Scotch Peer; and further, seeing that his position has been in no way affected by the decision in 1875, which conceded to the Earl of Kellie a Mar dignity by an alleged new creation in 1565, it follows that the said John Francis Erskine is now *de jure* and *de facto* by the laws of Scotland reserved inviolate by the Treaty of Union the actual tenant of the ancient and only Earldom of Mar on the Peerage Roll of Scotland; and I hereby protest against his vote as Earl of Mar (should it be tendered) being rejected, and against his being at any time and in any way denied the rights and dignities he inherits as representative and holder of the said ancient and only Earldom of Mar on the Union Roll of Scotch Peers.

In witness whereof, I have signed these presents, the eighth day of March 1879.

ARBUTHNOTT,

*Arbuthnott House, Fordoun.*

JOHN GORDON, witness, Butler,  
Arbuthnott House, Fordoun.

WM. TOSH, witness, Footman,  
Arbuthnott House, Fordoun.

*To the Lord Clerk Register of Scotland.*

I, William Henry Viscount Strathallan hereby protest against the vote of the Earl of Kellie being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar created in 1565, and resolved to belong to the Earl of Kellie, is not the Earldom on the Roll of Scotch Peers at the Union.

In witness whereof, I have signed these presents, the 7th day of March 1879, at Anerley, London, S.E.

STRATHALLAN. (L.S.)

HARRY LANCY, witness, Land Agent,  
Upper Norwood, S.E.

FREDERICK BULLOCK, witness,  
Chemist, Anerley.

I, Alexander Fraser, Lord Saltoun, do hereby protest against the Additional Protest of the Right Honourable Alexander William

Crawford, Earl of Crawford and Balcarres, dated the fourth day of March one thousand eight hundred and seventy-nine, in respect that the words used in the seventh section of the said Additional Protest, viz.: "And in the present instance where there is not the slightest evidence by writ or other competent proof that a new peerage of Mar was ever created, their Resolution, although confirmed by the Peers, and approved of by the Sovereign, is inoperative, and must be held null and void" (which words refer to the Committee of Privileges of the House of Lords), call in question and repudiate the judgment of the House of Lords, of date the twenty-fifth day of February one thousand eight hundred and seventy-five, on the Mar Peerage claims, transmitted to the Lord Clerk Register by the Clerk of the Parliaments, together with an Order of the House of Lords, of date the twenty-sixth day of February following referring thereto.

In witness whereof, I have subscribed this Protest at Holyrood House, this eleventh day of March in the year one thousand eight hundred and seventy-nine, in presence of the Peers assembled for the election of a Representative Peer of Scotland.

SALTOUN.

PALACE OF HOLYROOD HOUSE, *March 11th, 1879.*

MY LORD,—I desire to adhere to the Protest handed in to your Lordship by the Lord Saltoun.

BALFOUR.

#### X.—PROTESTS PRESENTED AT ELECTION, *16th April 1880.*

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, Charles Gordon, Marquis of Huntly, Earl of Aboyne and Enzie, etc., do hereby object to the Right Honble. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, has legally qualified himself as successor to his said

uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the fifteenth day of April 1880.

HUNTLY.

WILLIAM GIBSON, witness (Butler).

ALEXANDER CAMERON, witness (Valet).

*At Aboyne Castle, Aberdeenshire, April 15th.*

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, William Harry Hay, Earl of Errol, do hereby object to the Right Hon. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, has legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the tenth day of April 1880.

ERROLL.

JOHN REID, witness, Advocate, Aberdeen,  
10th April 1880, Slains Castle, Aberdeenshire.

GEORGE J. FRASER, witness, Doctor of Medicine,  
Cruden, Aberdeenshire, 10th April 1880.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, the Right Honourable Sholto John Watson Douglas, Earl of Morton, do hereby object to the Right Honble. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl

of Kellie, is not on the Roll of Scotch Peers; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll has legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the sixteenth day of April 1880, at Edinburgh, before these witnesses, Matthew Montgomerie Bell, Writer to the Signet, and William Smith, his clerk.

(L.S.) MORTON.

M. MONTGOMERIE BELL, witness.

WILLIAM SMITH, witness.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, Alan Plantagenet Stewart, Earl of Galloway, do hereby object to the Right Honble. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, has legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the sixteenth day of April 1880.

GALLOWAY.

EDINBURGH, 16th April 1880.

ROB. STEWART, of Number 114 George Street,  
Edinburgh, Law Clerk, witness.

JOHN MACKAY, of No. 114 George Street,  
Edinburgh, Law Clerk, witness.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, John Hamilton Dalrymple, Earl of Stair, do hereby object

to the Right Honble. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl of Kellie, is not on the Roll of Scotch Peers ; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, has legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the thirty-first day of March 1880.

STAIR.

ANDREW AGNEW of Lochnaw, Baronet, witness,  
Stranraer, 31 March 1880.

THOMAS CRABB GREIG, Factor, Rephad, Stranraer, witness,  
Stranraer, 31st March 1880.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, John Viscount Arbuthnott and Baron Inverbervie, do hereby object to the Right Honble. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl of Kellie, is not on the Roll of Scotch Peers ; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, has legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the ninth day of April 1880.

ARBUTHNOTT.

ALEXANDER STUART, Landed Proprietor,  
Laithers, Turriff, witness,  
9th April 1880, Arbuthnott House.

DAVID ARBUTHNOTT, witness,  
26 Colville Terrace, London.

*To the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, Charles Stuart, Lord Blantyre, do hereby object to the Right Honble. Walter Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll, and protest against his vote being accepted in right of the dignity of Mar, inasmuch as the Earldom of Mar, suggested by the Committee of Privileges of the House of Lords in 1875 to have been created in 1565, and resolved in consequence to belong to the Earl of Kellie, is not on the Roll of Scotch Peers; and seeing that the nephew and heir-general of the late John Francis Miller, who held and enjoyed the ancient and only Earldom of Mar on the Union Roll, has legally qualified himself as successor to his said uncle in that dignity, according to the forms competent to the Peers of Scotland, I further protest against his vote (should it be tendered) being rejected.

In witness whereof, I have signed these presents, the sixth day of April 1880.

JOHN WILSON, witness, Factor,  
6th April 1880, Erskine.

BLANTYRE,  
*Erskine, 6 April 1880.*

FREDERICK COLLETT, witness, Footman,  
6 April 1880, Erskine.

*To the Right Honourable the Lord Clerk Register of Scotland, or the Clerks of Session officiating in his place at the next ensuing election of Representative Peers of Scotland.*

MY LORD,—I, the Right Honourable Alexander William Crawford, Earl of Crawford and Balcarres, Lord Lindsay, etc., do hereby protest against the acceptance of the vote of the Right Honourable Walter Henry Earl of Kellie answering to the title of the Earl of Mar, which stands on the Union Roll of Peers, or voting in right of that title, and against the rejection of the vote of the Right Honourable John Francis Erskine, Earl of Mar, heir-general and tenant of the one and only Earldom of Mar standing on the Union Roll, and against the aggression upon the precedency of the Earls created before 1565, which is the effect of the acceptance of the vote of Walter Henry Earl of Kellie as tenant of an Earldom of Mar, affirmed to have been created in 1565, all in terms of and upon the *rationes* given in my former protests of the eighth day of December one thousand eight hundred and seventy-six, and of the fourth day of March one thousand eight hundred and seventy-nine.

In witness whereof, I have signed and sealed these presents, on the fifth day of April in the year one thousand eight hundred and eighty.

CRAWFORD AND BALCARRES. (L.S.)

PERCY KIDD, witness, Physician, Blackheath Park, London.

JOHN WRIGHT, witness, Butler, Haigh Hall, Wigan.

*To the Lord Clerk Register of Scotland, or the Clerks officiating in his place at the next ensuing election of Representative Peers for Scotland.*

I, Harry Burrard, Earl of Carnwath, do hereby object to the Rt. Honble. William Henry Earl of Kellie answering to the title of Earl of Mar on the Union Roll of the Peers of Scotland; and I protest against his vote being accepted in right of that dignity, if such is based on a decision of the Committee of Privileges of the House of Lords in virtue of a creation in 1565, no such creation being recorded or trace in any way found on the said Roll of Scotch Peers at the time of the Union, nor any power given by the terms of Union to the Sovereign or House of Lords to add to or to remodel in any way the Roll as then accepted and ever since acted upon.

In witness whereof, I have signed these presents, the fourteenth day of April 1880.

CARNWATH.

Witness :

WILLIAM JORDAN }  
RICHARD BELL } Servants at Bordsall House, York.

EDINBURGH, 16 April 1880.

I, the Honourable George Waldegrave Leslie, of Leslie, in the county of Fife, husband of the Right Honourable Henrietta Anderson Morshead Waldegrave Leslie, Countess of Rothes, Viscountess Ballinbreich, Baroness Leslie, whose title as Countess of Rothes is entered on the Union Roll as of the year 1457, do hereby protest against the Right Honourable Walter Henry Erskine, Earl of Mar and Kellie, answering to the name and title of Earl of Mar, as entered in the said Union Roll as of the year 1457, at an election of Representative Peers of Scotland, or on any other occasion, inasmuch as the said title of the Earl of Mar of 1457 is entered in the said Union Roll immediately before the title of the Earl of Rothes of 1457, and also inasmuch as the said Right Honourable Walter Henry Erskine, Earl of Mar of 1565, and Earl of Kellie of 1619, does not assume nor claim, and has never assumed nor claimed, neither is he entitled to assume or claim, the title of the Earldom of Mar of 1457, but has only assumed, and is only entitled to assume, the title of the Earl of Mar of 1565, as awarded to him by a Resolution of the Committee of Privileges of the House of Lords pronounced in the year 1875, and also the title of the Earl of Kellie of 1619.

(L.S.) GEORGE WALDEGRAVE LESLIE.

## PROTEST by FRANCIS BARON NAPIER.

I, Francis Baron Napier, do hereby object to the Earl of Mar and Kellie answering to the title of Earl of Mar when the old Earldom of Mar is called in its proper order on the Union Roll, for the following reasons :—

1. Because it is contrary to reason and precedent that an Earldom, ruled by the Committee of Privileges in the House of Lords to have been created in the year 1565, should be called and responded to in the order of a more ancient Earldom dating from the year 1457.

2. Because the calling of the more recent title in the order of the older one tends to confound the Earldom of Mar, which has been lately discovered to exist, with the ancient Earldom familiar to the peerage and history of Scotland.

3. Because the answering of the Earl of Mar and Kellie to the title of Mar in the old order tends to obscure and prejudice the claim of John Francis Goodeve Erskine to the old Earldom, a claim heretofore recognised in the election of the Representative Peers for Scotland, and which it is believed may yet be established before a Committee of Privileges in the House of Lords.

4. Because the answering of the Earl of Mar and Kellie in the order of the old title is derogatory to the dignity and precedency of those Earls whose titles are antecedent to the date of 1565, but whose titles are called after a title bearing that date.

NAPIER.

HOLYROOD PALACE, *April 16th, 1880.*

I, Alexander Fraser, Lord Saltoun, do hereby protest against the Protest of the Right Honourable the Earl of Galloway, dated 16th April 1880, being received, in respect that the said Protest calls in question and repudiates the judgments of the House of Lords of date the 25th February 1875 on the Mar Peerage claims, whereby the House of Lords resolved and adjudged that Walter Henry Earl of Kellie had made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland, and ordered that at the future meetings of the Peers of Scotland for the election of Representative Peers the Lord Clerk Register, or the Clerks of Session officiating thereat in his name, do call the title of Earl of Mar according to its place in the Roll of Peers of Scotland called at such election, and do receive and count the vote of the Earl of Mar claiming to vote in right of the said Earldom,

and do permit him to take part in the proceedings in such election.

In witness whereof, I have subscribed this Protest at Holyrood House, the sixteenth day of April one thousand eight hundred and eighty, in presence of the Peers assembled for the said election.

SALTOUN.

PALACE OF HOLYROOD HOUSE, *April 16th, 1880.*

I adhere to the Protest handed in by the Lord Saltoun.

BALFOUR.

The foregoing Return of Protests is certified as correct by me George Frederick Boyle, Earl of Glasgow, Lord Clerk Register of Scotland, this twenty-seventh day of December in the year one thousand eight hundred and eighty.

GLASGOW,

*Lord Clerk Register of Scotland.*

#### APPENDIX of Four Answers to Protests by the Earls of Kellie in reference to the Earldom of Mar.

*[The following Answers, without date, are put up with the official papers of the election of 3d December 1868, and are engrossed in the Minutes of that election.]*

I, Alexander Blair, advocate, for the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, on behalf of his Lordship, hereby tender the following Answers to the Protest now and formerly given in by the Earl of Kellie, Viscount Fenton and Lord Dirleton, and desire that the same may be recorded in the minutes of the present meeting for electing the Representative Peers of Scotland.

1. The Earl of Kellie is not heir of line of John Earl of Mar, subsequently Regent of Scotland, who, by the justice of Queen Mary and sanction of Parliament, was restored to the dignity of Mar as heir "in Bluid" of Dame Isabella Douglas, Countess of Mar in her own right, and also as descended from and representing his ancestress Lady Elyne, or Helen de Mar, daughter of Gratney Earl of Mar.

2. When, by the grace of His Majesty King George IV., certain Acts were passed in restoring the forfeited honours of certain noble Peers to the *direct* descendants of their bodies, John Francis Erskine of Mar, as grandson and "lineal descendant" of the

attainted Earl of Mar through his mother, the Lady Frances Erskine, who, but for her father's attainder, would upon the death of her only brother have been Countess of Mar in her own right, was restored to the honours, dignities, and titles of Earl of Mar, with all rights, privileges, and pre-eminences thereunto belonging.

3. That the restoration did no more than revive the Earldom of Mar, with its honours, titles, and dignities in favour of the lineal representatives or heirs of line of the attainted Peer, which character the Earl of Kellie does not possess.

4. Upon the demise of the Right Honourable John Francis Miller Erskine, Earl of Mar, in 1866, the right to the Earldom passed *jure sanguinis* to his nephew, the present Earl, John Francis Erskine Goodeve Erskine, who is the son of his sister, the Right Honourable Lady Frances Jemima Erskine or Goodeve.

5. That the fact of the said Earl of Mar's propinquity and of his being the nearest heir of his uncle is evidenced in the usual manner by his Lordship's service before the Sheriff of Chancery.

6. The assumption by the Earl of Kellie of the title of Lord Erskine in the Protest lodged by him is irregular. The Barony of Erskine is a separate honour, forming no portion of the Earldom of Mar. It was, before the attainder of Earl John, one of the oldest Scottish baronies, having been in existence long before the claim to the Mar dignities arose. It was forfeited in 1715, and there has never been any reversal of the attainder. If there had been, the Earl of Mar would have claimed the dignity as heir of line.

ALEXR. BLAIR.

[*The following Answers, without date, are put up with the official papers of the election of 4th August 1870, and are engrossed in the Minutes of that election.*]

I, Alexander Blair, advocate, for the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, on behalf of his Lordship, hereby tender the following Answers to the Protest by the Earl of Kellie, Viscount Fenton, and Lord Dirleton, and desire that the same be recorded in the minutes of the present meeting for electing a Representative Peer of Scotland.

1. The Earl of Kellie is not heir of line of John Earl of Mar, subsequently Regent of Scotland, who, by the justice of Queen Mary and sanction of Parliament, was restored to the dignity of Mar as heir of Dame Isabella Douglas, Countess of Mar in her own right, and also as descended from and representing his ancestress Lady Elyne, or Helen de Mar, daughter of Gratney Earl of Mar.

2. When, by the grace of His Majesty George IV., certain Acts were passed in restoring the forfeited honours of certain noble Peers to the direct descendants of their bodies, John Francis Erskine of Mar, as grandson and “lineal representative” of the attainted Earl of Mar through his mother the Lady Frances Erskine, who, but for her father’s attainder, would upon the death of her only brother have been Countess of Mar in her own right, was restored to the honours, dignities, and titles of Earl of Mar, with all rights, privileges, and pre-eminences thereto belonging.

3. That the restoration did no more than revive the Earldom of Mar, with its honours, titles, and dignities in favour of the lineal representative of heirs of line of the attainted Peer, which character the Earl of Kellie does not possess.

4. Upon the demise of the Right Honourable John Francis Miller Erskine, Earl of Mar, in 1866, the right to the Earldom passed *jure sanguinis* to his nephew, the present Earl, John Francis Erskine Goodeve Erskine, who is the son of his sister, the Right Honourable Lady Frances Jemima Erskine or Goodeve.

5. That the fact of the said Earl of Mar’s propinquity and of his being the nearest heir of his uncle is evidenced in the usual manner by his Lordship’s service before the Sheriff of Chancery.

ALEXR. BLAIR.

[*The following Answers, without date, are put up with the official papers of the election of 7th March 1872, and are engrossed in the Minutes of that election.*]

I, Alexander Blair, advocate, for the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, on behalf of his Lordship, hereby tender the following answers to the Protest given in by the Earl of Kellie, Viscount Fenton and Lord Dirleton, and desire that the same be recorded in the minutes of the present meeting for electing the Representative Peers of Scotland.

1. On the death of Thomas Earl of Mar, his sister Margaret succeeded as Countess of Mar; she was wife of William first Earl of Douglas, by whom she had a son and a daughter. The former, James Earl of Douglas, and, after the death of his mother, who survived her husband, Earl of Mar, was killed at Otterburn in 1388, and, dying without lawful issue, his sister Isabella became Countess of Mar in her own right, the Douglas honours passing to a distant member of that family.

2. The Countess Isabella, though twice married, had no issue by either of her husbands. By royal charter granted by King Robert III. His Majesty confirmed the honours of Mar to the

Countess Isabella and her second husband in *liferent*, and their children in fee, whom failing “*legitimis heredibus dictæ Isabellæ*.” The *liferent* Earl dying in 1435, this remainder came into operation, and Robert Lord Erskine, the direct descendant and representative of Elyne or Ellen de Mar, daughter of Gratney Earl of Mar, the grandfather of Earl Thomas, became entitled to the dignity of Earl of Mar, and after expending two services, assumed and bore the title until his death.

3. Nevertheless by a series of oppressive acts and the outrage of all justice, the Crown seized upon the Earldom and debarred the rightful heirs from possessing the same for a long series of years, until Her Majesty Queen Mary, moved by the great wrong committed by her predecessors or their advisers, by Her Royal Charter confirmed by Parliament, and dated 23d June 1565, restored the honours of Mar to Lord Erskine and his heirs, as direct heir of line of Robert Erskine, Earl of Mar, the next heir served and retoured to Isabella Countess of Mar.

4. By Act of Parliament dated 29th July 1589, the grant of Queen Mary was specially referred to and confirmed, and it was narrated specially that the heirs of the Earldom had been for a long series of years excluded from their just and lawful inheritance and “*wranguslie debarrit frome the poss<sup>oun</sup> of the said land, erldome, and lordschip, pairtlie be the occasioun of the trubles occurrand and interveneand and pt<sup>lie</sup> be the iniquitie of tyme, and staying of the ordiner course of justice to thame, be the partiall dailling of sic personis as had the governamet of Or Souerane Lord predicessouris and realme.*” And the Parliament decerned and declared that the Earl of Mar and *his heirs* have and shall have as good right to the Earldom as if he were immediate heir to the said Dame Isobell Douglas, or to umquhile Robert Earl of Mar, Lord Erskine, *her heir*.

5. When, by the grace of His Majesty King George IV., certain Acts were passed in restoring the forfeited honours of certain noble Peers to the *direct* descendants of their bodies, John Francis Erskine of Mar, as grandson and “lineal descendant” of the attainted Earl of Mar through his mother, the Lady Frances Erskine, who, but for her father’s attainder, would upon the death of her only brother have been Countess of Mar in her own right, was restored to the honours, dignities, and titles of Earl of Mar, with all rights, privileges, and pre-eminences thereunto belonging. This restoration did no more than revive the Earldom of Mar with its honours, titles, and dignities in favour of the *lineal* representatives or *heirs* of line of the attainted Peer.

6. Upon the demise of the Right Honourable John Francis Miller Erskine, Earl of Mar, in 1866, the right to the Earldom passed

*jure sanguinis* to his nephew, the present Earl, John Francis Erskine Goodeve Erskine, who is the son of his sister, the Right Honourable Lady Frances Jemima Erskine or Goodeve. That the fact of Earl of Mar's propinquity and of his being the nearest heir of his uncle is evidenced in the usual manner by his Lordship's service before the Sheriff of Chancery.

7. That the Earl of Mar is the direct *heir* of *line* of the Earldom revived and restored in 1565 and 1589, and the Earl of Kellie is not.

8. That the pretended claim set up by the late Lord Kellie, by means of which he proposed to subvert the plain letter of the charter and Acts of Parliament as to the line of succession to the Earldom, was grounded upon the alleged existence of a charter from the Crown in favour of *heirs-male* which he was called upon to produce, but which has not been produced, although the evidence on the claim commenced as far back as 17th July 1868.

ALEXR. BLAIR.

[*The following Answers are put up with the official papers of the election of 18th February 1874, and are engrossed in the Minutes of that election.*]

I, William Frederick Hunter, advocate, for the Right Honourable John Francis Erskine Goodeve Erskine, Earl of Mar, Baron Garioch, on behalf of his Lordship, hereby tender the following answers to the Protest given in by the Earl of Kellie, Viscount Fenton and Lord Dirleton, and desire that the same be recorded in the minutes of the present meeting for electing Representative Peers for Scotland.

1. On the death of Thomas Earl of Mar, his sister Margaret succeeded as Countess of Mar. She was wife of William first Earl of Douglas, by whom she had a son and a daughter. The former, James Earl of Douglas, and, after the death of his mother, who survived her husband, Earl of Mar, was killed at Otterburn 1388, and, dying without lawful issue, his sister Isabella became Countess of Mar in her own right, the Douglas honours passing to a distant member of that family.

2. The Countess Isabella, though twice married, had no issue by either of her husbands. By royal charter granted by King Robert III., his Majesty confirmed the honours of Mar to the Countess Isabella and her second husband in liferent and their children in fee, whom failing "*legitimis heredibus dictæ Isabellæ.*" The liferent Earl dying in 1435, this remainder came into operation, and Robert Lord Erskine, the direct descendant and representative of Elyne or Ellen de Mar, daughter of Gratney Earl of Mar, the

grandfather of Earl Thomas, became entitled to the dignity of Earl of Mar, and after expending two services, assumed and bore the title till his death.

3. Nevertheless, by a series of oppressive acts and the outrage of all justice, the Crown seized upon the Earldom, and debarred the rightful heirs from possessing the same for a long series of years, until her Majesty Queen Mary, moved by the great wrong committed by her predecessors or their advisers, by her royal charter, confirmed by Parliament, and dated 23d June 1565, restored the honours of Mar to Lord Erskine and his heirs, as direct heir of line of Robert Erskine Earl of Mar, the next heir served and returned to Isabella Countess of Mar.

4. By Act of Parliament dated 29th July 1589, the grant of Queen Mary was specially referred to and confirmed, and it was narrated specially that the heirs of the Earldom had been for a long series of years excluded from their just and lawful inheritance, and “wrangouslie debarrit from the possessioun of the said lands earldome and lordship, partlie be the occasiun of the troubles occurrand and intervenand and partlie be the iniquitie of tyme and staying of the ordinar course of justice to thame be the partiall deilling of sic personis as had the Governament of our Soverane Lordis predecessouris and realm;” and the Parliament decerned and declared that the Earl of Mar and *his heirs* have and shall have as good right to the Earldom as if he were immediate heir to the said Dame Isobell Douglass, or to unquhile Robert Earl of Mar, Lord Erskine, *her heir*.

5. When by the grace of his Majesty King George IV. certain Acts were passed in restoring the forfeited honours of certain noble peers to the *direct* descendants of their bodies, John Francis Erskine of Mar, as grandson and lineal descendant of the attainted Earl of Mar through his mother, the Lady Frances Erskine, who, but for the attainder of her father, would, upon the death of her only brother, have been Countess of Mar in her own right, was restored to the honours, dignities, and titles of Earl of Mar, with all rights, privileges, and pre-eminences thereunto belonging. This restoration did no more than revive the Earldom of Mar, with its honours, titles, and dignities, in favour of the *lineal* representatives of *heirs of line* of the attainted Peers.

6. Upon the demise of the Right Honourable John Francis Miller Erskine, Earl of Mar, in 1866, the right to the Earldom passed *jure sanguinis* to his nephew, the present Earl, John Francis Erskine Goodeve Erskine, who is the son of the late Earl's sister, the Right Honourable Lady Frances Jemima Erskine or Goodeve. The present Earl's propinquity, and the fact that he is the nearest heir of his uncle, the late Earl, is evidenced in the usual manner by his Lordship's service as such heir before the Sheriff of Chancery.

7. The Earl of Mar is thus the *direct heir of line* of the Earldom revived and restored in 1565 and 1824, and the Earl of Kellie is not.

8. The pretended claim set up by the late Earl of Kellie, and still insisted in by the present Earl of Kellie, by means of which he proposed to subvert the plain letter of the charter and Acts of Parliament as to *the line* of succession to the Earldom, was grounded upon the alleged existence of a charter from the Crown in favour of *heirs-male*, which he was called upon to produce, but which has never been produced, nor has the Earl of Kellie been able to produce any evidence of the change in the line of succession alleged by him, though the evidence on the claim commenced so far back as the 17th July 1868.

W. F. HUNTER.

HOLYROOD HOUSE, 18th Feb. 1874.

At the election on 22d Decr. 1876, the minutes of the election bear that “ Mr. John Francis Erskine Goodeve Erskine tendered a Protest against the Earl of Mar and Kellie answering to the title of Earl of Mar, but as this Protest was signed by the title ‘ Mar,’ the Lord Clerk Register, in respect of the Resolution of the House of Lords, dated 26th February 1875, and also of a Report entered in the Journals of the House of Lords, dated 23d April 1875, ordering *inter alia* that the appeal therein referred to ‘ should be amended by striking out therefrom the words claiming to be Earl of Mar,’ refused to receive the said Protest.”

The foregoing Appendix of Answers to Protests certified as correct by

GLASGOW,

Lord Clerk Register of Scotland.

December 27th, 1880.

2829











